82 - 2125

NO.

FILED
JUN 27 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

On Appeal from the New York State Court of Appeals

JURISDICTIONAL STATEMENT

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Counsel for Plaintiffs-Appellants

June 21, 1983

Questions Presented

I

Does the Twenty-first Amendment to the Constitution of the United States permit the City of New York to enact laws violative of other federal constitutional guarantees?

The local tax ordinance involved here is similar in form and substance to the tariffs collected by the United States Customs Service.* It is not a tax on a sales price and is open to the same objections as any tariff on any other product entering the City. It incorporates by reference Article 18** of the New York State Tax Law and impermissibly burdens and regulates interstate commerce: Tax Law §421 requires registration of distributors (importers) even prior to the first sale by the importer; §422 requires bonding of distributors; §426 maintenance of records of purchases and sales; §428 records and reports of transportation within and without the state; and §433, criminal penalties for violations. Under this New York City ordinance, a distributor is defined as "any person who *imports* or causes to be *imported* any alcoholic beverages which are or will be offered for sale or used for any commercial purpose". There are no distilleries in New York State, and the above provisions are clearly a direct burden on interstate commerce in practical effect. "Under the Constitution, this is a domain where Congress alone has the power or regulation and control."

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* Cf Tariff Schedules of United States Annotated (1981) Schedule I, part 12—Beverages page 88.

** §Y46-3.0.

II

Does Local Law No. 30 of 1980 of the City of New York violate the Supremacy Clause in Article VI, Cl. 2, of the Constitution of the United States?

Plaintiffs-appellants pleaded in their Complaint that Bulletin 529 of the State Liquor Authority illegally mandated the additional payment of an *unauthorized** 20% amount of the tax at the request of the wholesalers was a *per se* anti-competitive violation of the Sherman Antitrust Act (15 U.S.C. 1) and the Supremacy Clause of the United States Constitution. *Community Communications Co.* v. *City of Boulder,* 455 U.S. ——, January 17, 1982, 103 S.Ct. 835, is a case in which this Court granted certiorari, and is similar in principle to the instant case here on appeal from the New York Court of Appeals in that the Federal Court of Appeals made the same error as the State Court here as to exactly what was in issue before the Court. 630 F.2d 704, 706 and 718.

III

Does Local Law No. 30 of 1980 of the City of New York violate the Commerce Clause in Article I, Section 8, of the Constitution of the United States?

The imposition of the burden of the Tax Law, Sections 421, 422, 426, 428 and 433, incorporated into the local ordinance by reference, is repugnant to the right of Congress to regulate interstate commerce. Furthermore, wine, a domestic product, is excluded from tax under the City ordinance, so that it imposes a burden on liquor which intrastate commerce does not bear, so that if the power to tax were sustained, the City would be left free to exert it to the detriment of national commerce.

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* Invalidated in *Mancini* v. *McLaughlin,* 54 N.Y.2d 860, amd. 54 N.Y.2d 863, which did not involve the tax.

IV

Does Local Law No. 30 of 1980 of the City of New York violate the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States?

The illegally required payment of 20% of tax to wholesalers, invalidated in an independent action, constitutes a taking of property within the meaning of the Fifth and Fourteenth Amendments to the United States Constitution. Bulletin 529 was invalidated in an action not involving the tax, in *Mancini* v. *McLaughlin,* 54 N.Y.2d 860, amd. 54 N.Y.2d 863. For fiscal 1981 and 1982 alone, this illegal exaction amounted to $1,906,859.60, no part of which has been refunded, even though the Bulletin has been invalidated.

V

Does Local Law No. 30 of 1980 of the City of New York violate the Import-Export Clause in Article I, Section 10, of the Constitution of the United States?

Plaintiff-Appellant William Grant & Sons, Inc. is a Federally licensed importer and this tax intercepts its imports prior to the first sale.* There is already a multiplicity of taxes here with the State tax of 85.9¢ per liter on top of the City tax of 26.4¢ per liter, although Tax Law §445(4) curiously states that payment of the state and local taxes shall not be construed as the payment of either tax more than once.

VI

Does Local Law No. 30 of 1980 of the City of New York violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

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* *Brown* v. *Maryland,* 12 Wheat. 419.

A legislature cannot constitutionally discriminate in legislation between those in a group having definite attributes of identities as this local law does as between wholesalers and retailers, both of whom can reasonably import into the City of New York.

List of All Other Parties (Intervenors-Appellants)

Ace Wine & Liquor Corp., William J. Mezzetti Associates, Inc., Globe Liquor Inc., J & J Wine & Liquor Shop Inc., Leiser Liquor Inc., Frank Mancini, Jr., K.G.K. Corp., Liquor Emporium Inc., Berku Spirits Co. Inc., Nathan D. Fein Liquors Inc., 547 Liquor Corp., 37 St. Nicholas Corp., L. G. Liquor Corp., Swaby Package Store Inc., McAdam Liquor Company Inc., Harvey Entin d/b/a Oz Liquor Company, Smart Shopper Liquor Corp., Henry Kosiner, as Executor of the Estate of Lawrence Kosiner, Twin Towers Wine & Spirits Inc., 202 Discount Liquor Inc., Donmar Wine & Liquor Inc., Sidal Liquor Corp., Skyview Liquor Store Inc., Wakefield Wine & Liquor Corp., Irving Friedman and Norton Goldman d/b/a West Bronx Liquor Store, Zimmerman Liquor Inc., Roger Borello, Seymour J. Cash Inc., Interboro Wine & Liquor Inc., Kings Plaza Liquor Corp., 3080 Wines & Liquors Inc., Schacher Liquor Store Inc., Starrett City Wine & Liquors Inc., World Liquors Inc., Tozzi's Discount Liquors Inc., Richmond Liquor Corp., Staten Island Wine & Liquor Corp.

MEMBERS OF RETAILERS ALLIANCE, INC.

William H. Van Fleck Inc.
d/b/a Van Flock Liquors
116 Montague Street
Brooklyn, New York

Abramsky Wines & Liquors Inc.
d/b/a Van Fleck Liquors
55 W. 14 Street
New York, New York

Aylesbury Spirits Ltd.
d/b/a Cork & Bottle Wines & Liquors
1158 First Avenue
New York, N. Y. 10021

Diane Serra Inc.
d/b/a Gotham Liquors
1543 Third Avenue
New York, N. Y. 10028

Jack R. Battipaglia
d/b/a Grand Wines & Liquors
30-05 31 Street
Long Island City, N. Y. 11102

Forest Hills Liquors Corp.
108-09 Queens Boulevard
Forest Hills, N. Y. 11375

Derku Spirits Co.
d/b/a Excelsior Wines & Liquors
332 W. 57 Street
New York, N. Y. 10019

Arthur M. Ehrlich Inc.
222 Amsterdam Avenue
New York, N. Y. 10023

Lorraine Buscami
d/b/a Golden Liquors
41-07 Bell Boulevard
Bayside, New York 11361

North End Wine & Liquor Store Inc.
d/b/a North End Liquors
2509 Webster Avenue
Bronx, New York

Esposito Wines & Liquors Inc.
608 W. 207 Street
New York, N. Y. 10034

Paul Feuerstadt
d/b/a Tops Liquors
2816 Avenue U
Brooklyn, New York

Guliano Wines & Liquor Inc.
Korvettes Shopping Center
Bruckner Blvd. & White Plains Road
Bronx, N. Y. 10473

Myrtle Discount Center Liquors Inc.
d/b/a Queens Wines & Liquors
59-03 71 Avenue
Ridgewood, N. Y. 11227

Gold Star Wines & Spirits Inc.
d/b/a Enoteca
103-05 Queens Boulevard
Forest Hills, N. Y. 11375

Acker Merrall & Condit Liquors Inc.
2373 Broadway
New York, N. Y. 10024

Liquor City of Majors Inc.
Frank Grobman, David Gross, Alan
Gross, a Joint Venture
d/b/a Liquor City of Majors
2239 Forest Avenue
Staten Island, N. Y. 10303

Kings Plaza Liquor Corp.
d/b/a Kings Liquor Plaza
2418 Flatbush Avenue
Brooklyn, N. Y. 11234

Robert Merson
d/b/a Friedland Wines & Liquors
605 Lenox Avenue
New York, N. Y. 10037

Marrell & Co. Wines Emporium Ltd.
307 E. 53 Street
New York, N. Y. 10022

Bay Ridge Liquor Co. Inc.
d/b/a Bay Ridge Liquors
425-86 Street
Brooklyn, New York 11209

Richmond Liquor Corp.
d/b/a Liquor Giant
Staten Island Convenience Mall
Staten Island, N. Y. 10314

Principe Wines & Liquors
45-22 46th Street
Long Island City, N. Y. 11040

Ritter Wines & Liquor Inc.
549 Classon Avenue
Brooklyn, New York 11238

Mar-Pat Liquors
3112 Farrington Street
Pathmark Shopping Center
Whitestone, N. Y. 11354

Columbus Circle Liquors Inc.
1780 Broadway
New York, N. Y. 10019

383 Discount Supermarket
d/b/a First Avenue Wine Shop
383 First Avenue
New York, N. Y. 10010

Brills Liquor Mart Inc.
150 Chambers Street
New York, N. Y. 10007

Astor Wines & Spirits Inc.
12 Astor Place
New York, New York

Julia Provato
d/b/a A & J Provato Liquors
6415 18 Avenue
Brooklyn, N. Y. 11204

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF ALL OTHER PARTIES	v
TABLE OF AUTHORITIES	xii
OPINIONS BELOW	2
CONSTITUTIONAL PROVISIONS AND STATUTES	4
RAISING THE FEDERAL QUESTION	6
STATEMENT OF THE CASE	7
THE QUESTIONS ARE SUBSTANTIAL	11
CONCLUSION	13
APPENDIX:	
Opinion of New York State Court of Appeals, March 29, 1983	1a
Order of New York State Court of Appeals, March 29, 1983	2a
Opinion of Appellate Division, Third Department, March 5, 1981	4a
Opinion Supreme Court, Special Term, November 5, 1981; November 24, 1981	7a
Opinion of Appellate Division, Third Department, 457 NYS2d 481	20a
Local Law No. 30 of 1980 of the City of New York	33a
Notice of Appeal	43a

PAGE

Judgment of Special Term, January 29, 1982 ..... 48a

Opinion in Mancini v. McLaughlin, 54 NY 2nd 860 .... 53a

Tax Law:

Section 421 ..... 57a

422 ..... 57a

426 ..... 58a

428 ..... 59a

432 ..... 59a

433(2) 60a

445(4) 60a

PAGE

Table of Authorities

Cases Cited

Best & Co. v. Maxwell, 311 U.S. 454 12

Community Communications Co. v. City of Boulder, 455 U.S. —— January 17, 1982, 103 S.Ct. 835 .... ii, 9, 11

Mancini v. McLaughlin, 54 N.Y. 2d 860 and 54 N.Y. 2d 863 ..... ii, iii, 8

Metropolitan Package Store Association Inc. v. Koch, 3/5/81 437 NYS2d 760 ..... 1, 3

Metropolitan Package Store Association, Inc., 11/4/82 457 N.Y.S.2d 481 3

State Board of Equalization v. Young's Market, 299 U.S. 59 12

Western Livestock v. Bureau of Revenue, 303 U.S. 250 10

United States Constitution Cited

Article I, Section 8 ..... ii, 4

Section 10 ..... iii, 5

Article VI, Clause 2 ..... i, 4

Fifth Amendment ..... iii, 4

Fourteenth Amendment ..... iii, 5, 8

Twenty-first Amendment ..... i, 4, 9, 11, 12

PAGE

Statutes Cited

Alcoholic Beverage Control Law:

Sec. 62 7

CPLR Sec. 5519(a)(1) 2

Local Law No. 30 of 1980 of the City of New York ....i, ii, iii 2, 5-8

Tax Law

Section 421 ..... i, ii

422 ..... i, ii

426 ..... i, ii

428 ..... i, ii

432 ..... 2, 3, 6

433 ..... i, ii

433(2) .....

445(4) ..... iii, 10

15 U.S.C. Sec. 1 (Sherman Antitrust Act) ..... ii, 8

15 U.S.C. Sec. 13a (Robinson-Patman Act) 8

28 U.S.C. Sec. 1257(2) 4

NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

On Appeal from the New York State Court of Appeals

JURISDICTIONAL STATEMENT

Metropolitan Package Store Association, Inc.; Paul Wayne, d/b/a Colony Liquors; and William Grant & Sons, Inc., Plaintiffs-Appellants, appeal from the final judgment of the New York State Court of Appeals dated March 29, 1983, leaving standing the order of the New York Supreme Court, Appellate Division, Third Department, entered November 16, 1982, affirming the judgment entered in the Supreme Court, Albany County, (1) granting Defendants-

Appellees' motion for summary judgment; (2) denying the motions of Plaintiffs-Appellants and Plaintiffs-Intervenors-Appellees for summary judgment; and (3) dismissing the complaints of Plaintiffs-Appellants and Plaintiffs-Intervenors-Appellees.

The New York State Court of Appeals, in a final order dated March 29, 1983, granted Defendants-Appellees' motion to dismiss the appeals to that Court on the ground that there was no substantial constitutional questions directly involved in them.

Opinions Below

The opinion of the New York State Court of Appeals, which appears in the appendix hereto, p. 1a, *infra*, is reported at N.Y.2d (1983).*

This action was commenced in the New York State Supreme Court, Albany County, on or about August 18, 1980, and a preliminary injunction was granted to the Plaintiffs-Appellants by the Hon. John H. Pennock in the New York State Supreme Court, Albany County,** on the grounds that Local Law No. 30 of 1980 of the City of New York violated the Constitution of the United States, and the Plaintiffs were entitled to an injunction pursuant to Section 432 of Article 18 of the Tax Law. The Defendants-Appellees immediately filed an appeal with the Supreme Court, Appellate Division, Third Department, and obtained an automatic statutory stay pursuant to CPLR §5519(a)(1). The Appellate Division, Third Department, handed down its opinion in writing on March 5, 1981 in which it modified the order of Special Term of September 23, 1980, reversing so much as granted Plaintiffs-

* Appendix 1a.

** Appendix 48a.

Appellants' motion for a preliminary injunction, and as so modified, affirmed and refused to dismiss the Complaint. The opinion of the Appellate Division of March 5, 1981 makes no reference at all to the constitutional point in the order of Special Term, nor did it address itself to the statutory authorization to issue an injunction on constitutional grounds granted pursuant to Section 432 of Article 18 of the Tax Law, reference to which was made in the order of the Hon. John H. Pennock of September 23, 1980. The opinion of the Appellate Division appears in the appendix hereto, p. 49, *infra*, and is reported at 80 A.D.2d 928, 437 N.Y.S.2d 928 (1981).

After hearing oral argument on the merits, the New York Supreme Court, Albany County, Special Term, granted Defendants-Appellees' motion to dismiss the Complaint by order dated January 22, 1982. There was an unreported opinion of Hon. John H. Pennock dated November 5, 1981, and an amended opinion dated November 24, 1981, copies of both of which are reprinted in the appendix hereto, p. 7a *infra*.

The Order of Special Term dated January 22, 1982 was thereafter appealed to the New York State Supreme Court, Appellate Division, Third Department, and upon that appeal, the Judgment was affirmed. The opinion is reprinted in the appendix hereto, p. 20a *infra*, and is reported at A.D.2d , 457 N.Y.S.2d 481.

The matter was appealed to the New York State Court of Appeals, and that Court, by final order dated March 29, 1983, granted a motion to dismiss the appeal holding that there was no substantial constitutional question directly involved.

This appeal is being docketed in this Court within 90 days from the date of the decision of the New York State Court of Appeals.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Constitutional Provisions and Statutes

Twenty-first Amendment, United States Constitution:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Article VI, Cl. 2, United States Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article I, Section 8, of the United States Constitution:

The Congress shall have Power • • • To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Amendment V of the United States Constitution:

No person shall • • • be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, Section 1, of the United States Constitution:

No State shall • • • deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10, Cl. 2, United States Constitution:

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress.

The pertinent portions of *Local Law No. 30 of the City of New York* read as follows:

§Y46-1.0. Definitions. • • •

6. "Distributor." Any person who imports or causes to be imported into this City any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufactures, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale, • • •.

§Y46-2.0. Imposition of tax.

(a) There are hereby imposed on a distributor and a noncommercial importer excise taxes at the following rates:

• • •

(2) twenty-six and four-tenths cents per liter upon liquors, when sold or used within this city, • • •.

A complete copy of the Local Law is reprinted at p. 57a.

Raising the Federal Question

At the earliest possible stage of the proceedings below, the Plaintiffs-Appellants raised the claims herein in their Complaint, as indicate both by the Complaint and the order of Hon. John H. Pennock dated September 23, 1980, where he granted "the Motion for Preliminary Injunction on the grounds that Local Law No. 30 of 1980 of the City of New York violates the Constitution of the United States, and that the plaintiffs are entitled to said injunction without an undertaking pursuant to Section 432 of Article 18 of the Tax Law."

These constitutional claims were reiterated by the appellants before the Supreme Court, Appellate Division, Third Department, and were considered by that Court in its opinion of November 4, 1982 under the captions "Export-Import Clause", "Commerce Clause", "Due Process", "Equal Protection", "Supremacy Clause", and "Remaining Challenges". The same arguments were advanced in the New York State Court of Appeals as were advanced in the courts below, and that Court dismissed this action in its opinion of March 29, 1983, stating that there was no substantial constitutional question directly involved. It thus considered and expressly rejected these Federal constitutional claims.

Statement of the Case

The Plaintiffs-Appellants in this case are a trade association of retail liquor dealers, one of its members operating a retail liquor store, and an importer of Scotch Whisky which operates distilleries in Scotland and has its bonded warehouses and its principal offices in Edison, New Jersey. Under New York State law, an importer must be licensed as a wholesaler, and he may sell to other wholesalers or retailers; he may not sell to consumers (ABC Law, §62). A retail license is required for retail sales, and wholesalers may not hold a retail license. A retail licensee under New York law only sells liquor and wine and may not engage in the sale of beer, so that beer is not in issue in this case.

On or about June 23, 1980, the City of New York enacted Local Law No. 30 of 1980 of said City, which by its terms imposes an excise tax in Section Y46-2.0 of 26.4¢ per liter upon* "any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose". Said Local Law was thereafter made effective on August 1, 1980.

The New York State Liquor Authority thereafter implemented said Local Law No. 30 by mandating increases in liquor prices on sales by licensed retail package stores of 20% of the tax by issuing Bulletin No. 529 of 1980 under color of law. This bulletin was issued by the Authority after it had meetings with the State Department of Taxation and Finance, personnel from the New York City Finance Administration, and representatives of virtually all of the wholesale liquor dealers within the State of New

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* §46-1.0(6).

York. In article FIFTH of the Complaint, it is alleged that Bulletin No. 529 constitutes a price fixing agreement between the State Liquor Authority and certain wholesalers, without authority in law, and as such is a patent violation of the Sherman Anititrust Act (15 U.S.C. Sec. 1) and the Robinson-Patman Act (15 U.S.C. Sec. 13a) and by reason thereof, constitutes violations of the Supremacy Clause and the Commerce Clause of the United States Constitution. Further it is alleged that the Local Law deprives the plaintiff retailers of equal protection of law provided to them by the Fourteenth Amendment to to the Constitution of the United States, and they are denied due process in that they are being deprived of their property by paying over a mandated 20% of the tax under the color of law under a bulletin that has since been invalidated.

After the New York State Liquor Authority had issued its Bulletin No. 529, this action was commenced for declaratory judgment and injunction to restrain its enforcement.

On September 23, 1980, Special Term issued a preliminary injunction on the grounds that Local Law No. 30 of 1980 violated the Constitution of the United States. On appeal the Appellate Division reversed and lifted the preliminary injunction, but held that the Complaint stated a cause of action, but its opinion did not address itself to the constitutional points.

Thereafter, on the merits in the Supreme Court, the Complaint was dismissed principally because the Court of Appeals had in the meantime handed down its opinion in the independent case of *Mancini* v. *McLaughlin*, 54 N.Y.2d 863, which was not a tax case, but directed solely at Bulletin No. 529, and the Court held that the State Liquor Authority had acted in excess of its authority in issuing

that bulletin. Except to the extent that it invalidated Bulletin No. 529, it was in no way dispositive of the other issues here. Plaintiffs here had made the same contention in their Complaint in this case along with numerous others.*

Thereafter, an appeal on the merits was again taken to the Appellate Division, Third Department, from the order of Special Term entered January 29, 1982, and that Court rendered its decision on November 4, 1982.

The Appellate Division, Third Department, in its decision misconceives the thrust of the XXI Amendment; it was only cited below to show that the City ordinance in no way benefits from the protection of the Amendment. The Court does not distinguish between the exercise of police power and taxing powers of the City in discussing the Amendment. The attempt to regulate commerce by the City is sufficient to invalidate the local law.

As noted supra, Local Law No. 30 of 1980 enacted at tax of 26.4¢ upon sales of liquor in the City of New York. Bulletin No. 529 of the State Liquor Authority, which was issued at the request of wholesalers, imposed an additional charge of 20% of the tax. Plaintiffs contended this was price fixing *per se* and without statutory authority. The Appellate Division, however, held this was "not at issue here". This was the same error as was made by the Federal Court of Appeals in *Community Communications Company* v. *City of Boulder*, 639 F.2d 704, 706 and 718, but this Court granted certiorari and reversed.

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* At the time of the re-argument in January 1982, Bulletin No. 529 had not been rescinded and in fact, its rescission was not finally made effective until May 1, 1982 with the issuance of Bulletin 535, even though the decision of the Court of Appeals was in October of 1981.

As to the Import-Export Clause, it will be noted that the tax is aimed at imports by reason of the definition of "distributor" in the ordinance* and because of the fact that there are no distilleries in New York State. The tax under the local law is triggered by the liquor moving in commerce and attaches to the first sale while the product is still in the hands of the importer. Plaintiff-Appellant Willam Grant & Sons imports scotch whisky from its distilleries in Scotland, and the tax under the local law intercepts this import.

Tax Law §445(4) appears to anticipate an attack on the tax on the ground of multiplicity of taxation when it provides in part: "• • • Nothing in this article which requires payment of both state and local taxes to the tax commission shall be construed as the payment of either tax more than once". In reality, the same tax is being assessed twice.

It is significant, also, that Tax Law §427 of Article 18 contains a cross-reference to exemption from sales taxes (now obsolete), but the Appellate Division nonetheless characterizes this customs type tax as a tax on local sales by a City.

As to the Commerce Clause, the Appellate Division curiously says that the imported liquor has virtually an exclusive nexus with New York City under this customs type tax by a City levied on a liter of liquor which ignores the distilling of scotch abroad, its importation into this country by a licensed importer, the payment of Federal tariffs on the import and costs of transportation and with no allocation of the cost factors making up the liquor as taxed. It cannot be said here that all of the events upon which the tax is conditioned occurred in New York City. The preparation of the product and its packaging occur elsewhere. Cf. *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250, 260. This is not a tax on the sales price. In ad-

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* Y46-1.0(6).

dition, wine, a domestic New York State product, is excluded from tax by definition,* although taxed under the State statute.

As to due process, the Appellate Division again disposes of this contention by stating it was based on the infirmities of Bulletin 529, and even though the Court of Appeals voided that bulletin on very narrow grounds. The Appellate Division, nevertheless, held it is beyond the scope of the appeal. But see comments above with respect to *Community Communications Co.*

As to the argument under the Equal Protection Clause, that, too, is swept away with the "ill-fated Bulletin 529". It is curious that the plaintiffs who make the same contention are denied relief in this action because others were successful on this point in another action, and where there has been an illegal exaction of $1,906,859.60 in the first two years of the tax.

The Questions are Substantial

In this local ordinance we have an assessment which is closely akin to a customs tax and is similar in format to the tariffs of the United States Government. It is not protected by the Twenty-first Amendment, because that amendment by its terms applies only to a "State, Territory or possession of the United States", and clearly a city ordinance is not within its scope, nor can such local municipal ordinance benefit from the powers granted for this in a nation of States, and the federalism principle "makes no accommodation for sovereign subdivisions of States". *Community Communications Co., Inc.* v. *City of Boulder*, 455 U.S. ——, January 17, 1982, 103 S.Ct. 835.

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* §Y46-1.0(5).

The City of New York is in no better or different position than it would be had the Twenty-first Amendment never been adopted since it does not by its terms apply to it. In *State Board of Equalization* v. *Young's Market Co., et al.*, 299 U.S. 59, 62, the Court in an opinion by Justice Brandeis held that a state might subject commerce in liquor destined for use within the state to any burden it might choose. California had imposed a $500 license fee for the privilege of importing beer into the state, and the importer sued to enjoin enforcement of the fee. The Court held that "Prior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide."

This customs type tax can be applied to any other product that might be imported into the State if the Court's opinion in this case is sustained for the reason that the City of New York is not protected under the Twenty-first Amendment even as to liquor, and shippers of flour, lumber or any other commodity will be in the same position as the importers of liquor: the logical extension of the principle here would permit taxation of these other products.

This is a cleverly drafted piece of legislation, but the teachings and decisions of this Court are to the effect that: "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Counsel for Plaintiffs-Appellants

June 21, 1983

APPENDIX

Opinion of New York State Court of Appeals
March 29, 1983

COURT OF APPEALS

State of New York

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3 Mo. No. 144

METROPOLITAN PACKAGE STORE, ASSOCIATION, INC., et al.,

Appellants,

vs.

EDWARD I. KOCH, as Mayor of the City of New York, *et al.*,

Respondents,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellants.

Motion to dismiss the appeals herein granted and the appeals dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

Chief Judge Cooke took no part.

Decision Court of Appeals Mar 29 1983

Order of New York State Court of Appeals
March 29, 1983

COURT OF APPEALS

State of New York

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of March A.D. 1983

PRESENT, Hon. Mathew J. Jasen, Sr. Associate Judge, Presiding:

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3 Mo. No. 144

METROPOLITAN PACKAGE STORE, ASSOCIATION, INC., *et al.*,

Appellants,

vs.

EDWARD I. KOCH, as Mayor of the City of New York, *et al.*,

Respondents,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellants.

Order of New York State Court of Appeals
March 29, 1983

A motion having heretofore been made herein upon the part of respondents Koch and City of New York to dismiss the appeals taken by the appellants and the intervenors-appellants in the above cause to this Court, said motion having been joined in upon the part of respondent State Tax Comimssion, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeals dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

Chief Judge Cooke took no part.

JOSEPH W. BELLACOSA
Clerk of the Court

Opinion of Appellate Division, Third Department
March 5, 1981

SUPREME COURT
Appellate Division, Third Department

March 5, 1981

METROPOLITAN PACKAGE STORE
Association Inc. *et al.*,

Respondents,

v.

EDWARD I. KOCH, as Mayor of the City of New York, *et al.*,

Appellants.

MEMORANDUM BY THE COURT

Appeal from an order of the Supreme Court at Special Term, entered September 24, 1980 in Albany County, which granted plaintiffs' motion for a preliminary injunction and denied the City of New York's cross motion to dismiss the complaint.

Plaintiffs, a trade association of retail liquor dealers in New York City, one of its members and a liquor distributor in New York City, commenced this action seeking a declaratory judgment declaring Local Law No. 30 of 1980

of the City of New York unconstitutional, and a permanent injunction enjoining the administration and enforcement of the local law. Local Law No. 30 of 1980 of the City of New York, enacted pursuant to section 445 of the Tax Law, imposes an excise tax on distributors and noncommercial importers of beer and alcohol sold or used in the city and a floor tax on persons who own or possess certain amounts of beer or alcohol on the effective date of the local law. The taxes are administered by the State Tax Commission (Tax Law, § 445, subd. 4), which pays the taxes collected to the city (Tax Law, § 445, subd. 7). After the State Liquor Authority issued a bulletin detailing the procedure to be followed in incorporating the tax in wholesale and retail prices, this action was commenced. Plaintiffs moved for a preliminary injunction and defendants cross-moved to dismiss the complaint. Special Term granted plaintiffs' motion and denied defendants' cross motion.

(1-3) In our view, Special Term erred in granting plaintiffs' motion. One of the conditions which plaintiffs must meet in order to establish their entitlement to a preliminary injunction is the showing of irreparable harm without the injunction (*Picotte Realty* v. *Gallery of Homes,* 66 A.D.2d 978, 412 N.Y.S.2d 47). Plaintiffs must show that the irreparable injury to be sustained by them is more burdensome to them than the harm caused by defendants through imposition of the injunction (*Nassau Roofing & Sheet Metal Co.* v. *Facilities Dev. Corp.*, 70 A.D.2d 1021, 1022, 418 N.Y.S.2d 216). In its affidavit in support of the motion for a preliminary injunction, the plaintiff trade association has alleged that its members "will be hard pressed to advance considerable sums of money to pay these taxes * * * [and] will be forced out of business in many cases." There is

nothing in the record to support this conclusory allegation. Since the taxes will be refunded if plaintiffs succeed on the merits, we perceive no irreparable harm. Moreover, the bulletin issued by the State Liquor Authority requires the retailer to pass the cost of the tax along to the consumer and thus it is not the retailer who is paying the tax. Plaintiffs also argue that they sell in quantity to persons outside the City of New York and that due to the taxes imposed by the local law, those consumers will now purchase from retailers outside of the city. They further argue that they will be unable to prove such losses at a later time. There is, however, no support in the record for either contention. Since plaintiffs have failed to establish irreparable harm, they are not entitled to a preliminary injunction.

(4) Defendants also contend that Special Term erred in denying their motion to dismiss the complaint, but we find the allegations of the complaint sufficient to withstand such a motion. Accordingly, the order appealed from should be modified by reversing so much thereof as granted plaintiff's motion for a preliminary injunction.

Order modified, on the law and the facts, and in the exercise of discretion, by reversing so much thereof as granted plaintiffs' motion for a preliminary injunction, and, as so modified, affirmed, without costs.

Opinion Supreme Court, Special Term
November 5, 1981; November 24, 1981

SUPREME COURT OF THE STATE OF NEW YORK
County of Albany

METROPOLITAN PACKAGE STORE ASSOCIATION, INC., PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs,

—against—

EDWARD I. KOCH as Mayor of the City of New York, THE CITY OF NEW YORK and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, ROBERT E. DOYLE and DOROTHEA J. KLAJBOR as the Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Plaintiffs-Intervenors.

Appearances:

Gerard A. Navagh
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Allen G. Schwartz, Esq.
Corporation Counsel
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The City of New York and Koch
100 Church Street
New York, New York 10007

Robert Abrams, Esq.
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Mehler & Buscemi, Esqs.
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New York, New York 10007

Seymour S. Howard, Esq.
Attorney for Plaintiffs-Intervenors
Ace Wines & Liquors, Inc., et al.
380 North Broadway
Jericho, New York 11753

(2) PENNOCK, J:

This is a motion by Metropolitan Package Store Association, Inc.; Paul Wayne, d/b/a Colony Liquors and Wil-

liam Grant & Sons, Inc., the plaintiffs in this declaratory judgment and action for injunction for an order striking out the defendants' answers and directing summary judgment in favor of the defendants,

(a) Decreasing and declaring that the provisions of Local Law No. 30 of 1980 of the City of New York are unconstitutional and void.

(b) Enjoining and restraining the defendants and their successors from administering and collecting taxes pursuant to said Local Law No. 30 of 1980 or imposing any sanctions or penalties for plaintiffs failure to comply with said Local Law.

The Plaintiffs-Intervenors join in the motion.

The Defendant, State Tax Commission, opposes.

The Defendant, Koch, herein referred to as City opposes plaintiffs motion and cross-moves for summary judgment.

The Plaintiffs commenced this action in August 1980 seeking a declaratory judgment declaring Local Law No. 30 of 1980 of the City of New York unconstitutional and seeking a permanent injunction enjoining the administration and enforcement of the Local Law. The Defendant timely served an answer.

Local Law No. 30 was enacted pursuant to Tax Law 445 and imposes an excise tax upon distributors and non-commercial (3) importers of alcohol sold or used in New York City and a floor tax upon persons who own or possess certain amounts of alcoholic beverages on the effective date of the Local Law August 1, 1980. On July 16, 1980 the State Liquor Authority issued Bulletin No. 529 which in effect implemented a system of collection of the tax by increas-

ing the price on alcohol which was eventually passed on to the consumer. (This issue has been determined by the Court of Appeals in another case which addressed itself to the same principle. It held that the State Liquor Authority exceeded the authority conferred upon it by statute.) Therefore, Bulletin No. 529 as an administrative act was null and void. As a result any issues regarding Bulletin No. 529 in this proceeding are considered to be favorably decided against the defendants. Therefore, the Answer and State Liquor Authority is dismissed based upon Mancini decision. (Mancini v. McLaughlin and others constituting the State Liquor Authority, —— NY 2nd —— decided October 13, 1981).

The City of New York contends that the Bulletin of the State Liquor Authority cannot be considered in determining the validity of Local Law 30 at this juncture, since the Court of Appeals resolved the issue as to Bulletin No. 529, it is not a part of the ingredient of constitutionality of Local Law 30 and any issues raised have been theretofor determined herein and the Bulletin has no further legal effect.* The Court agrees and Local Law No. 30 must now sustain itself as to constitutionality.

(4) In 1971, the State Legislature enacted Section 445 of the Tax Law (L 1971, Ch. 406, Sect. 1) which authorized any city in this State "having a population of one million or more, acting through its legislative body" to adopt and amend local laws imposing in any such city "excise taxes on a distributor and a non-commercial importer" at certain specified rates on beer and liquor "when sold or used in such city."

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* See letters Koch, City Corporation Counsel, Oct. 13, 1981, Oct. 20, 1981 subsequent to Mancini Decision, Ct. of Appeals Oct. 13, 1981.

This enabling act also contains the following provisions:

"3. All the provisions of this article shall apply to the taxes authorized by subdivision one of this section and the provisions of section four hundred twenty, four hundred twenty-six, four hundred twenty-nine through four hundred thirty-four, four hundred thirty-six and four hundred thirty-seven shall apply to the tax authorized by subdivision two thereof, so far as such article or sections can be made applicable to the taxes authorized by this section with such limitations as set forth in this section and such modifications as may be necessary in order to adapt such language to the local taxes authorized by this section. Provided, however, in every case where the words "this state" appear in subdivision four of section four hundred twenty-four exempting quantities of liquor from tax, and in the definition of "Distributor" or "Noncommercial importer" in section four hundred twenty, such words "this state" shall be read as "this city" for purposes of the taxes authorized by this section. Where the word "state" is used in a phrase (5) referring to the sale or use of alcoholic beverages in this state, such word "state" shall be read as "city for purposes of the taxes authorized by this section, unless the word "city" clearly is not applicable.

4. Any taxes imposed pursuant to the authority of this section shall be administered and collected by the tax commission in the same manner as the taxes imposed under sections four hundred twenty-four and four hundred twenty-five subject to all provisions

of this article as may be applicable. The state tax commission is hereby empowered to make such provisions as it deems necessary for the joint administration and collection of the state and local taxes imposed and authorized by this article. Nothing in this article which requires payment of both state and local taxes to the tax commission shall be construed as the payment of either tax more than once."

On June 23, 1980, the City of New York enacted Local Law No. 30 of 1980 which imposed an excise tax on a "distributor and non-commercial importer" at a rate of 26.4 cents per liter on liquor, when sold or used within this City is without power to impose such tax * * *." A copy of the Local Law 30 is annexed to the plaintiffs moving papers on this motion as Exhibit A.

Bulletin No. 529 was issued by the New York State Liquor Authority to implement the excise tax. Thus the excise tax was added to price by wholesalers by adding 20% to the price per each size container in accordance with a price schedule. This adopted procedure (6) is presumptive evidence of the discriminating practice and a violation of 101-b of the Alcoholic Beverage Control Law. This issue has been eliminated by the Mancini decision.

Bulletin No. 529 has been declared illegal by the Court of Appeals and thus the remaining question is the validity of Local Law No. 30.

(a) Does it violate the due process and equal protection of the laws clauses of the Federal and State Constitution?

(b) Does the law conflict with a general law, to wit, section 101-b of the Alcoholic Beverage Law?

(c) Is the law as enacted materially vague and ambiguous?

(d) Was the local law enacted in accordance with the provisions of the New York City Charter?

(e) Is the local law and Section 445 of Tax Law unconstitutional as violative of Import-Export Clause and Commerce Clause of the United States Constitution?

In the present posture of this case, I find that most of the issues except those questions set forth have been determined by the Court of Appeals in the Mancini case (Mancini Supra) except the questions set forth shall be addressed by this Court.

The City of New York in imposing the excise tax has imposed an excise tax on alcoholic beverages which is effective only within a political subdivision of the City of New York and not outside that political subdivision. (7) This is the first instance where there has been an increase in taxes on liquor in relation to a restricted area of the State, all other taxes were on a state-wide basis. Section 101-b of the Alcoholic Beverage Control Law prohibits differential in prices by wholesalers between one retailer and another. This law never anticipated the levy of this excise tax. The Local Law No. 30 is in direct conflict with Section 101-b of the Alcohol Beverage Control Law. However, I do not pass on this question since the elimination of Bulletin No. 529 of the S.L.A. leaves this issue in "limbo". There is nothing in the record that shows how the tax shall be administered in the future. It may be assumed that the Tax Commission shall collect the tax from the wholesalers and not the retailers. The imposition of this tax poses a strong question of double taxation as the liquor shall be subject

to two excise taxes—one by the State and a second by the city. It cannot be considered a sales tax and it has not been so designated.

The plaintiffs contend that the tax imposed by the Local Law violates the Import-Export Clause of the United States Constitution as well as its commerce clause. (Article I, 10 Clause 2 U.S. Constitution). The City's tax is imposed upon distributors at a specified sum per gallon of beer and per liter of liquor when sold or used within the city. (Adm. Code, Sect. Y 46-2.0, subd. (a) (8) A "distributor" is defined to include not only importers, but also persons acquiring alcoholic beverages stored in the city, as well as persons producing them within the city. Adm. Code Sect. Y 46-2.0, subd. 6 as follows:

> "Any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufacturers, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale, * * *".

This excise tax meets the test of Michelin Tire case when the Supreme Court held that a non-discriminatory ad valorem property tax imposed by a State upon an inventory of imported goods maintained in a warehouse in the State, whether or not in original packages, is not an import or duty on imports barred by the Import-Export Clause. Michelin held that the State excise tax, similar to the tax

under review here, was based upon the sale and use of liquor in New York City, and without a showing of discrimination does not interfere with commerce. For decades the Courts have sustained State excise taxes on sales of imported liquor after its importation into the state. [Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)]. In Seagram the State Courts have held that an excise tax on liquor (9) that comes to rest in New York State does not violate the Import Clause for the tax is simply not within the purpose of the constitutional prohibition. [Seagram v. State Liquor Authority, 25 NY 2nd 865 (1969) aff'd. on op. of App. Div. 30 A.D. 2nd 380 3rd Dept. 1968, App. dsm. 396 U.S. 121 1969.

The city urges that this city excise tax is a counterpart of the State tax on Alcoholic Beverages (Tax Law Art. 18), which imposes the State tax in language identical to that of the City's Tax Law on distributors. (See Tax Law 424 sub. 1; 420, sect. 4). Therefore, if the City tax law violates the Import-Export and Commerce Clauses of the Federal Constitution, then the State Alcoholic Beverage Tax Law would similarly be invalid. The principle as stated is correct, and the theory is correctly stated. However, there is a distinction in that the present excise tax is limited to a geographic area of the State. All of the cases cited by the city apply to a geographic state tax and not a limited geographic area, such as a city within the state, for example, Long Is. Oil v. Comd. of Trans. 70 AD 2nd 303.

Simply put, the Michelin rule does not apply to the local City excise tax because the tax does not produce a forbidden effect on interstate commerce. In any event, the present case presents no facts in the (10) record that any of the liquor taxed would find a destination outside New York

State. There is some proof by argument and in the record that indicates some plaintiffs sell to customers outside New York City but within New York State. This does not bring the constitutional prohibition into play. In conclusion, this Court finds no merit to the plaintiffs contention that the excise tax law violates the Import-Export or the Commerce Clauses of the United States Constitution.

Another primary contention of this plaintiff is that the Local Law violates the Equal Protection Clause. The elimination of the bulletin by Mancini strips the plaintiffs arguments of any violations. In respect to violation of due process in regard to classifications and use of terms such as "distributors" is of no consequence and has no more arbitrariness than other aspects of the tax law in regard to definitions. There is no merit to the plaintiffs contentions that Local Law as enacted contrary to the City Charter. No referendum is required to enact this Local Law. The mere administration of collection of taxes does not require a referendum.

Contentions of the plaintiff in respect to violation of the Sherman Anti Trust Act are without merit because Mancini has eliminated the bulletin (Mancini Supra).

All questions heretofore set forth for "a" to "e" are answered in the negative.

Summary Judgment is granted to the Defendant City.

All papers to Defendant City to submit judgment on notice.

Dated: Albany, New York
November 5, 1981

JOHN H. PENNOCK
Justice of Supreme Court

Opinion Supreme Court, Special Term
November 5, 1981, November 24, 1981

STATE OF NEW YORK

Supreme Court Chambers

Albany

(Seal)

John H. Pennock
Justice

November 24, 1981

Gerard A. Navagh, Esq.
Seymour S. Howard, Esq.
Mehler & Buscemi, Esqs.
Warren Pesetsky, Esq.
Robert Abrams, Esq.
Allen G. Schwartz, Esq.

Re: Metropolitan Package Store Assn., Inc. et al.
v. Edward I. Koch, et al
Decision dated November 5, 1981

Dear Counselors:

Enclosed please find two corrected pages to replace pages 8 and 9 of the above decision dated November 5, 1981. The changes are in form and not substance and more explicitly sets forth the intent of the decision. I do not see any resultant necessary changes in the submitted judgments, however, if any counsel desires to submit amended judgment he may do so. Please destroy pages 8 and 9 of the previous decision sent to you and insert these corrected cases.

Yours very truly,

s/ JOHN H. PENNOCK

nmc

(8) A "distributor" is defined to include not only importers, but also persons acquiring alcoholic beverages stored in the city, as well as persons producing them within the city. Adm. Code Sect. Y 46-2.0, subd. 6 as follows:

> "Any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufacturers, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale, * * *".

This excise tax meets the test of Michelin Tire case when the Supreme Court held that non-discriminatory ad valorem property tax imposed by a State upon an inventory of imported goods maintained in a warehouse in the State, whether or not in original packages, is not an import or duty on imports barred by the Import-Export Clause. Michelin held that the State excise tax, similar to the tax under review here, was based upon the taxpayer's inventory of tires imported into State of Georgia and here it is based on sale and use of liquor in New York City, and without a showing of discrimination does not interfere with commerce. (Michelin Tire Corp v. Wages, 423, U.S. 276 (1976). For decades the Courts have sustained State excise taxes on sales of imported liquor after its importation into the state. (Seagram v. State Liquor Authority, 25 NY 2nd 865 (9) (1969) aff'd. on op. of App. Div. 30 A.D. 2nd 380

3rd Dept. 1968, App. dsm. 396 U.S. 121 1969.) In Seagram the State Courts have held that an excise tax on liquor that comes to rest in New York State does not violate the Import Clause for the tax is simply not within the purpose of the constitutional prohibition.

The city urges that this city excise tax is a counterpart of the State tax on Alcoholic Beverages (Tax Law Art. 18), which imposes the State tax in language identical to that of the City's Tax Law on distributors. (See Tax Law 424 sub. 1; 420, sect. 4). Therefore, if the City tax law violates the Import-Export and Commerce Clauses of the Federal Constitution, then the State Alcoholic Beverage Tax Law would similarly be invalid. The principle as stated is correct, and the theory is correctly stated. However, there is a distinction in that the present excise tax is limited to a geographic area of the State. All of the cases cited by the city apply to a geographic state tax and not a limited geographic area, such as a city within the state, for example, Long Is. Oil v. Comd. of Trans. 70 AD 2nd 303. Also Roosevelt Raceway, Inc. v. County of Nassau, 18 NY 2d 30 (1966), remittitur den 18 NY 2d 720, and app dsmd 385 US 453.

Simply put, the Michelin rule does apply to the local City excise tax because the tax does not produce a forbidden effect on interstate commerce. In any event, the present case presents no facts in the

Opinion of Appellate Division, Third Department
457 NYS2d 481

SUPREME COURT

Appellate Division, Third Department

November 4, 1982

METROPOLITAN PACKAGE STORE ASSOCIATION INC. *et al.*,

Appellants,

and

ACE WINES & LIQUORS, INC., *et al.*,

Intervenors-Appellants,

v.

EDWARD I. KOCH, as Mayor of the City of New York, *et al.*,

Respondents.

WEISS, Justice.

Plaintiffs and plaintiffs-intervenors are either retailers, wholesalers, or a trade association of liquor retailers, who seek a judgment declaring that the provisions of Local Law No. 30 of 1980 of the City of New York are unconstitutional and void, and enjoining defendants from administering and collecting excise taxes pursuant thereto or from imposing sanctions or penalties for noncompliance. Said

local law was enacted by defendant City of New York pursuant to enabling legislation enacted by the Legislature as section 445 of the Tax Law in 1971 (L.1971, ch. 406, § 1), and imposes a New York City excise tax in the sum of 12 cents per gallon upon beer and 26.4 cents per liter on liquor, upon distributors and noncommercial importers of alcohol which is sold or used in New York City (Administrative Code of the City of New York, § Y46-2.0). The local law also included a one-time floor tax "upon persons owning or possessing specified amounts of alcoholic beverages on August 1, 1980", the effective date of the local law (*id.*). In order to implement collection of the excise taxes, defendant State Liquor Authority issued Bulletin 529 which required that wholesalers of liquor "collect" the taxes established plus the additional sum of 20% of such taxes. The Bulletin had the effect of mandating that wholesalers pass the tax plus a 20% markup thereon along to retailers who then included the increases in their minimum retail consumer prices. The complaint alleged, *inter alia*, that the provisions of the local law, as implemented by Bulletin 529, are unconstitutional as violative of the Supremacy Clause (U.S. Const., art. VI, cl. 2), the Commerce Clause (U.S. Const., art. I, § 8, cl. 3), the Import-Export Clause (U.S. Const., art. I, § 10, cl. 2), and the 14th Amendment (U.S. Const., 14th Amdt., § 1). The complaint also alleges violations of the New York State Constitution's prohibitions against incorporation by reference to other statutes (N.Y. Const., art. III, § 22, cl. 1; art. III, § 22, cl. 1; art. III, § 16), and of the due process clause (N.Y. Const., art. I § 6). Additionally, the complaint alleges that the Local Law, as implemented by Bulletin 529, violates State (General Business Law, § 340) and Federal law (U.S. Code, tit. 15, §§ 1, 13a) pro-

hibiting price fixing and restraint of trade. On March 19, 1981, this court reversed an earlier order at Special Term whi h granted plaintiffs' motion for a preliminary injunction, but affirmed the denial of defendants' motion for summary judgment dismissing the complaint (*Metropolitan Package Store Assn.* v. *Koch*, 80 A.D.2d 940, 941, 437 N.Y.S.2d 760). On October 31, 1981, the Court of Appeals held Bulletin 529 invalid and enjoined its enforcement by the State Liquor Authority on the ground that the Authority exceeded its statutory power to adopt regulations by directing that the excise tax and a 20% markup thereof be included in the retail price of alcoholic beverages (*Mancini* v. *McLaughlin*, 54 N.Y.2d 860, 444 N.Y.S.2d 901, 429 N.E.2d 408, remittitur amd. 54 N.Y.2d 863). Here, Special Term denied plaintiffs' motion to strike the answer and for summary judgment, and granted instead defendants' cross motion for summary judgment dismissing the complaint. After reargument, Special Term rendered final judgment declaring Local Law No. 30 of 1980 to be valid and constitutional, and dismissed the complaint insofar as it sought injunctive relief, giving rise to this appeal.

(1-4) Plaintiffs contends that our decision in *Metrooplitan Package Store Assn.* v. *Koch*, 80 A.D.2d 940, 437 N.Y.S. 2d 760 constitutes the law of this case,[1] and that plaintiffs

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[1] Special Term granted plaintiffs a preliminary injunction enjoining the administration and enforcement of Local Law No. 30, and denied the City of New York's cross motion to dismiss the complaint, made before its answer was interposed. In our decision, we reversed that portion of the order which granted plaintiffs a preliminary injunction, and affirmed the denial of the city's motion to dismiss the complaint, holding: "we find the allegations of the complaint sufficient to withstand such a motion" (*Metropolitan Package Store Assn.* v. *Koch*, 80 A.D.2d 940, 941, 437 N.Y.S.2d 760).

should be entitled to summary judgment on their constitutional attacks upon Local Law No. 30. This argument is without merit. The law of the case doctrine requires that once an issue is judicially determined, it is deemed to be conclusive as to courts of co-ordinate jurisdiction (*Martin* v. *City of Cohoes*, 37 N.Y.2d 162, 165, 371 N.Y.S.2d 687, 332 N.E.2d 867; 7 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 5501.11, p. 55-30). The rule is not inflexible (*People* v. *Leone*, 44 N.Y.2d 315, 320, 405 N.Y.S.2d 642, 376 N.E.2d 1287), and applies only to issues decided, directly or by implication, at an earlier stage of the action (Siegel, New York Practice, § 448, p. 593). Upon a motion to dismiss a complaint for legal insufficiency in an action for a declaratory judgment, the test "is not whether the complaint shows plaintiff will succeed in getting a declaration of rights in accordance with his theory and contentions, but whether he is *entitled to a declaration of rights at all.* If the complaint states the substance of a bona fide justiciable controversy which should be settled, a cause of action for a declaratory judgment is stated" (*Baldwin* v. *City of Buffalo*, 7 A.D.2d 386, 387, 183 N.Y.S.2d 576, citing 1 Anderson, Actions for Declaratory Judgments, p. 600). Having made no determination on the merits in plaintiffs' favor, Special Term was not obligated by this court's prior decision to render judgment in plaintiffs' favor.

IMPORT-EXPORT CLAUSE

(5) Local Law No. 30 does not violate the Import-Export Clause[2] which bans only imposts or duties on imports or exports. The subject tax is imposed in a non-discriminatory fashion upon importers and persons acquiring alcoholic beverages or producing them and is effective only upon the sale or use of such beverages in New York City after they have come to rest in the city—a purely local event. Consequently, the tax does not offend any of the policy considerations protective of Federal interests underlying the Import-Export Clause (see *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285-286, 96 S.Ct. 535, 540-541, 46 L.Ed.2d 495; see, also, *Dept. of Rev. of Washington*, v. *Assoc. of Washington Stevedoring Comps.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682). Moreover, the tax is not on the act of transporting or shipping beer and liquor into this State (*Dept. of Revenue* v. *James Beam Co.*, 377 U.S. 341, 343, 84 St.Ct. 1247, 1248, 12 L.Ed2d 362), but upon the sale or distribution after they have come to rest in New York City. Thus, the Import-Export Clause is not violated (see *House of York, Ltd.* v. *Ring*, 322 F.Supp. 530).

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[2] "No State, shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws; and the net Produce of all Duties and Imports, laid by any State on Imports or Exports, shall be for the use of the Treasury of the United States, and all such Laws shall be subject to the Revision and Control of the Congress" (U.S. Const., art. I, § 10, cl. 2).

COMMERCE CLAUSE

(6) We further hold Local Law No. 30 is not violative of the Commerce Clause.[3] Tax laws have been sustained so long as they have a substantial nexus with the taxing State, are fairly apportioned, do not discriminate against interstate commerce, and are fairly related to services provided by the State (*Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326, see, also, *Dept. of Rev. of Washington* v. *Assoc. of Washington Stevedoring Comps., supra; General Motors Corp.* v. *Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430; *Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421). To be remembered is the fact that the Commerce Clause does not state a prohibition; it merely grants specific power to Congress (*Dept. of Rev. of Washington* v. *Assoc. of Washington Stevedoring Comps.*, 435 U.S. 734, 749, 92 S.Ct. 1388, 1398, 55 L.Ed.2d 682, *supra*), and that interstate commerce must bear its fair share of the tax burden (*id.* at 750, 98 S.Ct. at 1399). The excise tax imposed by Local Law No. 30 being levied only upon goods sold or used in New York City, has virtually an exclusive nexus with that city, and does not unfairly discriminate against plaintiffs. Nor can it be said that the free flow of goods between States is seriously affected, because the tax applies only after the goods come to rest in New York City. Nothing in the record suggests

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[3] "The Congress shall have Power * * *

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes * * *."

(U.S. Const., art. 1, § 8, cl. 3).

that the tax is not fairly related to services and protection provided by the City of New York and there is no factual basis to declare the tax violative of the Commerce Clause.

DUE PROCESS

(7, 8) Plaintiffs contend Local Law No. 30 violates the 14th Amendment to the U.S. Constitution and section 6 of article I of the New York Constitution, because it is too indefinite, vague and unclear, and, as implemented, constitutes a taking of property without due process. Plaintiff-intervenor Ace Wines and Liquors, Inc., contends that the law denies retailers classification as "a distributor" which denies them the use of tax money and interest thereon from the time of their payment to the wholesalers until it is paid over to the State Tax Commission, and further that they are denied "distributor" status even though they frequently function as "importers" by causing beer and liquor to be brought into New York City. Initially, we note that a strong presumption of validity attaches to legislative enactments, imposing upon a party who challenges the constitutionality of a statute a heavy burden of establishing unconstitutionality beyond a reasonable doubt (*Nettleton Co.* v. *Diamond*, 27 N.Y.2d 182, 315 N.Y.S.2d 625, 264 N.E.2d 118, app. dsmd. *sub nom. Reptile Prods. Assn.* v. *Diamond*, 401 U.S. 969, 91 S.Ct. 1201, 28 L.Ed.2d 319; see, also, *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 54, 378 N.Y.S.2d 1, 340 N.E.2d 444). We reject plaintiff's vehement arguments centered upon the purported constitutional affirmities of Bulletin 529 which implemented the local law, and we hold that the determination by the Court of Appeals in *Mancini* v. *McLaughlin*, 54 N.Y.2d 860, 444

N.Y.S.2d 901, 429 N.E.2d 408, *supra*, clearly removes from the court's review the collection scheme delineated by the Bulletin. Although the Court of Appeals voided the Bulletin solely on the narrow issue that the State Liquor Authority had exceeded the powers given to it by statute, the Bulletin is no longer extant, and therefore any consideration of its infirmities or effects upon Local Law No. 30 is beyond the scope of this appeal.

There can be no doubt that the local law was enacted solely and simply as an exercise of the taxing power of the city and bears no motivation other than to raise revenue. "This being so, the due process clause may not here be availed of to condemn the statute. That clause, it has been said, 'is applicable to a taxing statute * * * only if the act to be so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property'" (*Ampco Print-Advertisers' Offset Corp.* v. *City of New York*, 14 N.Y.2d 11, 24, 247 N.Y.S. 2d 865, app. dsmd. 379 U.S. 5, 85 S.Ct. 47, 13 L.Ed.2d 21, quoting from *Magnano Co.* v. *Hamilton*, 292 U.S. 40, 44, 54 S.Ct. 599, 601, 78 L.Ed. 1109; see *Shapiro* v. *City of New York*, 32 N.Y.2d 96, 102, 343 N.Y.S.2d 323, app. dsmd. 414 U.S. 804, 94 S.Ct. 68, 38 L.Ed.2d 40). We find no forbidden purpose present, discounting again plaintiffs' arguments centered upon Bulletin 529, and hold that the terms of the law and its references to the Tax Law are clear and understandable to persons of "common intelligence" (*Connally* v. *Gen. Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322). Moreover, we reject plaintiffs' contention that retailers have been denied due process of law

because the local law does not classify them as "distributors". Defendants' interpretation of the word "import" in the definition of "distributor" refers to transactions in foreign commerce not intrastate commerce, and is neither arbitrary nor unreasonable (see *Matter of Burger King* v. *State Tax Comm.*, 51 N.Y.2d 614, 621, 435 N.Y.S.2d 689, 416 N.E.2d 1024). This interpretation conforms with common usage and meaning applied by the Tax Law (Administrative Code, § Y46-1.0, subd. 15; Tax Law, § 445, subd. 3).

EQUAL PROTECTION

(9, 10) The differential treatment afforded wholesalers and retailers is not violative of equal protection. This court has recently rejected a constitutional challenge to the taxing power of the City of New York (*Matter of Manganaro* v. *Tully*, 88 A.D.2d 206, 453 N.Y.S.2d 889 (unincoroprated business tax)). We noted "[i]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification" (quoting *Madden* v. *Kentucky*, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590), and that "[t]he test is whether the difference in treatment is an invidious discrimination" or is "palpably arbitrary" (citing *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 359, 93 S.Ct. 1001, 1003, 35 L.Ed.2d 351). The local law imposes the tax upon distributors who import into the city any alcoholic beverages for sale or use in the city, and does not distinguish between retailers and wholesalers. The distinctions complained of appeared in the ill-fated Bulletin 529, already declared void in *Mancini* v. *McLaughlin* (*supra*), and are no longer at issue. The Legislature has wide discretion in creating tax classifications (*Shapiro* v.

City of New York, 32 N.Y.2d 96, 103, 343 N.Y.S.2d 323, *supra*). The tax is imposed upon those who import alcoholic beverages for sale or use in the City of New York and since it is solely intended to produce optimum revenue, it is a valid legislative enactment (*Matter of Long Is. Light Comp.* v. *State Tax Comm.*, 45 N.Y.2d 529, 535-536, 410 N.Y.S.2d 561, 382 N.E.2d 1337). "[T]hat a 'fairer' taxing formula might have been adopted is of no moment" (*id.* at 535, 410 N.Y.S.2d 561, 382 N.E.2d 1337).

NEW YORK STATE CONSTITUTION

(11) Plaintiffs erroneously argue that both Local Law No. 30 and section 445 of the State Tax Law (L.1971, ch. 406, § 1) violate a provision of the State Constitution against incorporation of sections of other statutes by reference (N.Y. Const., art. III, § 22). It has been held that this section of the Constitution was originally intended to apply to annual recurring taxes known at the time of its adoption, imposed generally upon the entire property of the State (*Matter of McPherson*, 104 N.Y. 306, 10 N.E. 685; *Matter of Stickney*, 110 App.Div. 294, 296, 97 N.Y.S. 336) and does not apply to all local taxes (*Berkshire Fine Spinning Assoc.* v. *City of New York*, 5 N.Y.2d 347, 358, 184 N.Y.S.2d 623, 157 N.E.2d 614; see, also, *Jones* v. *Chamberlain*, 109 N.Y. 100, 108-109, 16 N.E. 72).

Plaintiffs' further argument that Local Law No. 30 violates section 16 of article III of the State Constitution prohibiting incorporation of statutes by reference without verbatim insertion of such act, similarly fails. Concededly, the enabling act and the local law both incorporate by reference other sections of the Tax Law dealing with ad-

ministration and collection. However, reference "to the procedure of an earlier general statute does not contravene this provision of the Constitution" (*Richfield Oil Corp.* v. *City of Syracuse,* 287 N.Y. 234, 240-241, 39 N.E.2d 219). Moreover, the enabling act was an amendment to article 18 of the Tax Law and as such was not a violation of section 16 of article III (*People ex rel. N.Y. Elec. Lines Co.* v. *Squire,* 107 N.Y. 593, 602, 14 N.E. 820).

SUPREMACY CLAUSE

(12) Plaintiffs argue that Local Law No. 30 constitutes pricefixing per se in violation of the Sherman Anti-Trust Act and the Supremacy Clause (U.S. Const., Art. VI, cl. 2). We disagree. Initially, we reject plaintiffs' argument as erroneously premised upon Bulletin 529 which, we reiterate, is not at issue herein. Moreover, the subject laws and regulations fall within the "State action" exemption to the Sherman Act and thus do not violate the Act nor, by implication, the Supremacy Clause (see *New Motor Vehicle Bd. of California* v. *Orrin W. Fox Co.,* 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361; *Exxon Corp.* v. *Governor of Maryland,* 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91; *City of Lafayette* v. *Louisiana Power and Light Co.,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364). The exemption applies since the excise tax was specifically authorized by State laws, and enforced by State and municipal officials acting as State agents (see *Parker* v. *Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315; Tribe, American Constitutional Law, § 5-22, p. 309, n. 12; see, also, *National League of Cities* v. *Usery,* 426 U.S. 833, 855, n. 20, 96 S.Ct. 2465, 2476, n. 20, 49 L.Ed. 2d 245).

REMAINING CHALLENGES

(13) We find no consistency between Local Law No. 30 and section 101-b of the Alcoholic Beverage Control Law violative of section 2 (subd. (c), par. (ii)) of article IX of the New York State Constitution. By focusing their challenge once again on Bulletin 529 plaintiffs and plaintiff-intervenors have effectively raised no valid argument regarding an alleged inconsistency. In any regard, Local Law No. 30 is solely revenue producing while section 101-b of the Alcoholic Beverage Control Law is purely regulatory. Such statutes are to be harmonized whenever possible (*Cimo* v. *State of New York,* 306 N.Y. 143, 116 N.E.2d 290), and section 445 of the Tax Law and Local Law No. 30, enacted long after section 101-b of the Alcoholic Beverage Control Law should prevail (*People ex rel. Thorpe* v. *Clark,* 62 A.D.2d 216, 403 N.Y. S.2d 910; see McKinney's Cons. Laws of N.Y., Book 1, Statutes, §§ 391, 398).

(14) The technical violation of section 39 of the New York City Charter, which requires approval at a public referendum of any enactment transferring powers vested in a municipal agency to a non-municipal agency, does not void the local law. While it is true that the power to administer and collect all excise taxes is placed in the Department of Finance (N.Y. City Charter, §§ 39, 1504, subd. 2; Administrative Code, § Y46-4.0), and here, such power has been transferred to the State Tax Commission without referendum approval, we hold that the State, through the enabling act (Tax Law, § 445) authorizing Local Law No. 30, and section Y46-4.0 of the Administrative Code of the City of New York, has effectively superseded the referendum requirement provision of sec-

tion 39 of the New York City Charter (see *City of New York* v. *Maltbie*, 274 N.Y. 90, 96-97, 8 N.E.2d 289; *Rooney* v. *City of Long Beach*, 42 A.D.2d 34, 39, 345 N.Y.S.2d 66, app. dsmd. 33 N.Y.2d 897, 352 N.Y.S.2d 449, 307 N.E. 2d 564).

(15) Plaintiffs' argument concerning inconsistencies between the local law and section 171-a of the Tax Law, respecting disposition of the excise taxes, presents no real conflict. The statutes relate to different taxes from different sources, and may easily be harmonized since proceeds from State taxes inure to the State and those from the city tax revert to the city (Administrative Code, § Y46-5.0; see McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 391, p. 555, n. 11).

(16) Nor do we find that the local law offends the 21st Amendment to the United States Constitution, because there is no attempt made to regulate either the transportation or importation of liquor into this State. The imposition of an excise tax at the moment of sale or use of goods after they have come to rest in the city is within the sovereign power of the State, here, passed on to the City of New York by the enabling act.

Finally, having failed to establish that Local Law No. 30 is violative of either the United States or New York Constitutions, or in any other respect invalid, neither plaintiffs nor plaintiff-intervenors are entitled to an injunction enjoining enforcement of the law.

The judgment should be affirmed, without costs.

Judgment affirmed, without costs.

Local Law No. 30 of 1980 of the City of New York

Local Law 30

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to raising revenue by imposing taxes on beer and liquor sold or used in the city of New York.

Be it enacted by the Council as follows:

Section 1. Chapter forty-six of the administrative code of the city of New York is amended by adding a new title Y, to read as follows:

TITLE Y

TAX ON BEER AND LIQUOR

§Y46-1.0. *Definitions.*—When used in this title the following terms shall mean or include:

1. "Person." An individual, partnership, society, association, corporation, joint stock company, and any combination of individuals, and also an executor, administrator, receiver, trustee or other fiduciary.

2. "Alcohol." Ethyl alcohol, hydrated oxide of ethyl or spirit of wine, from whatever source or by whatever process produced.

3. "Beers." All alcoholic beer, lager beer, ale, porter, and stout, and all other fermented beverages of any name

or description manufactured from malt, wholly or in part, or from any substitute therefor containing one-half of one per centum, or more, of alcohol by volume.

4. "Liquors." Any and all distilled or rectified spirits, alcohol, brandy, cordial (whether the base therefore be wine or liquor), whisky, rum, gin and all other distilled beverages containing alcohol, including all dilutions and mixtures of one or more of the foregoing, including any alcoholic liquids which would be wines if the alcoholic content thereof were not more than twenty-four per centum by volume. Such term shall not include liquors containing not more than twenty-four per centum of alcohol by volume.

5. "Alcoholic beverages." Beers or liquors.

6. "Distributor." Any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufactures, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale, except (a) a person who manufactures, mixes or compounds alcoholic beverages the ingredients of which consist only of alcoholic beverages on which the taxes imposed by this title have been paid, and (b) a person who mixes or compounds alcoholic beverages with non-alcoholic ingredients for sale and immediate consumption on the premises, who shall be a distributor only with respect to the ingedients which consist of alcoholic beverages upon which the taxes imposed by this title have not been paid.

7. "Noncommercial importer." A person other than a distributor who imports or causes to be imported into this city alcoholic beverages, except that such person shall not be a noncommercial importer where he imports or causes to be imported into this city alcoholic beverages in the quantities and under the condition provided by subdivision (c) of section Y46-2.0 of this title.

8. "Sale." Any transfer, exchange or barter in any manner or by any means whatsoever. The sale of warehouse receipts given upon the storage of alcoholic beverages shall not be construed as a sale of the beverage represented by such receipts.

9. "Use." Any compounding or mixing of alcoholic beverages with other ingredients or other treatment of the same in such manner as to render them unfit or unsuitable for consumption as a beverage and also the actual consumption or possession for consumption of alcoholic beverages as beverages or otherwise.

10. "Gallon." One hundred twenty-eight fluid ounces: "quart" means thirty-two fluid ounces.

11. "Liter." A metric unit of capacity equal to one thousand cubic centimeters of alcoholic beverages and equivalent to thirty-three and eight hundred fourteen thousand fluid ounces.

12. "City." The city of New York.

13. "Commissioner of Finance." Commissioner of finance of the city.

14. "Tax Commission." The tax commission of the state of New York.

15. Unless a different meaning is clearly required, any term used in this title shall have the same meaning as when used in a comparable context in the laws of the state of New York relating to taxes on alcoholic beverages.

§Y46-2.0. Imposition of tax.

(a) There are hereby imposed on a distributor and a noncommercial importer excise taxes at the following rates:

(1) twelve cents per gallon upon beers; and

(2) twenty-six and four-tenths cents per liter upon liquors, when sold or used within this city, except when sold or used under such circumstances that this city is without power to impose such tax or when sold to the United States, and except beers when sold to or by a voluntary unincorporated organization of the armed forces of the United States operating a place for the sale of goods pursuant to regulations promulgated by the appropriate executive agency of the United States, and except when sold to professional foreign consuls-generally, consuls and vice-consuls who are nationals of the state appointing them and who are assigned to foreign consulates in this city provided that American consular officers of equal rank who are citizens of the United States and who exercise their official functions at American consulates in such foreign country are granted reciprocal exemptions; provided, however, that the tax commission may

permit the sale of alcohol without tax to holder of any industrial alcohol permit, alcohol permit or alcohol distributor's permit issued by the state liquor authority, and by the holder of an alcohol distributor's permit, class A, issued by such authority to a holder of a distiller's license, class B, or a winery license, issued by such authority and may also permit the use of alcohol for any purpose other than the production of alcoholic beverages by such holders without tax.

Notwithstanding any other provision of this title, the tax commission may permit the purchase of liquors without tax by a holder of a distiller's license issued by the state liquor authority from another holder of a distiller's license by such authority, in which event the liquors so purchased shall be subject to the tax imposed by this title in the hands of the purchaser in the same manner and to the same extent as if such purchaser had imported or caused the same to be imported into this city or had produced, distilled, manufactured, brewed, compounded, mixed or fermented the same within this city.

(b) There is also imposed on each person, other than a distributor within the meaning of this title, who, on the effective date of this title, owns and possesses for the purposes of sale beers or liquors, a floor tax at the rates applicable under subdivision (a) upon such beer in excess of one hundred gallons and upon such liquor in excess of four hundred liters. Such floor tax shall be due and payable on the twentieth day of the month succeeding the month in which this title becomes effective.

(c) If, prior to the taking effect of this title, a contract of sale of alcoholic beverages was made, and delivery thereof pursuant to such contract is made within this city on or after the effective date of this title, the vendor shall be deemed a distributor for the purposes of this title, and such alcoholic beverages shall be deemed to be sold, and shall be subject to such taxes, at the time of such delivery.

(d) In any case where the quantity of alcoholic beverages taxable pursuant to this title is a fractional part of one liter (or one gallon in the case of beers) or an amount greater than a whole multiple of liters (or gallons in the case of beers), the amount of tax levied and imposed on such fractional part of one liter (or one gallon in the case of beers), or fractional part of a liter (or gallon) in excess of a whole multiple of liters or gallons shall be such fractional part of the rate imposed by subdivision (a) and (b) of this section.

(e) Notwithstanding any other provisions of this title, there shall be exempt from the taxes imposed under this title, per month, one quart of alcoholic beverages (or one gallon of such beverages in the case of a person arriving directly from American Samoa, Guam or the Virgin Islands of the United States not more than one quart of which shall have been acquired elsewhere than in such insular possessions):

(1) purchased outside this city as an incident to a journey from which the purchaser is returning and

(2) not to be offered for sale or used for any commercial purpose, provided such alcoholic bever-

ages accompany such person on his return to this city and provided, further, that in the case of a person arriving in this city from other than a state of the United States (including the District of Columbia), the Virgin Islands of the United States or a contiguous country maintaining a free zone or free port, such person shall have remained beyond the territorial limits of the United States for a period of not less than forty-eight hours.

Provided, however, where the amounts purchased outside the city or brought in exceed the amounts specified in this subdivision (e) but are not in excess of one liter in the case of the reference to one-quart or four liters in the case of the references to one gallon, and where no duty is required by the laws of the United States to be paid on such amounts, such metric standards of fill shall be substituted for one-quart and one gallon, respectively, and such amounts shall be exempt from tax under the conditions provided for in this subdivision (e).

§Y46-3.0 *Manner of administration and collection.*

All the provisions of article eighteen of the tax law shall apply to the taxes imposed by subdivision (a) of section Y46-2.0 of this title, and the provisions of sections four hundred twenty, four hundred twenty-six, four hundred twenty-nine through four hundred thirty-four, four hundred thirty-six and four hundred thirty-seven of article eighteen of the tax law shall apply to the tax imposed by subdivision (b) of section Y46-2.0, so far as such article or sections can be made applicable to the taxes imposed by this title with such limitations as set forth in section four hundred forty-five of the tax law and such modifications as may be necessary in order to adapt such language to the taxes imposed by this title.

Local Law No. 30 of 1980 of the City of New York

§ Y46-4.0. *State tax commission; administration*

The taxes imposed by this title shall be administered and collected by the tax commission in the same manner as the taxes imposed under sections four hundred twenty-four and four hundred twenty-five of article eighteen of the tax law subject to all provisions of that article as may be applicable. The tax commission may make such provisions as it deems necessary for the joint administration and collection of the state and local taxes imposed and authorized by article eighteen of the tax law and this title. Nothing in article eighteen or this title which requires payment of both state and local taxes to the tax commission shall be construed as the payment of either tax more than once.

§ Y46-5.0. *Disposition of revenues.*

All taxes, penalties and interest imposed by this title, which are collected by the state tax commission, shall be deposited daily with such responsible banks, banking houses or trust companies, as may be designated by the state comptroller, to the credit of the comptroller, in trust for this city. Such deposits shall be kept in trust and separate and apart from all other monies in the possession of the comptroller. The comptroller shall require adequate security from all such depositories of such revenues collected by the tax commission. The comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds in respect of the taxes imposed by this title, and for reasonable costs of the state tax commission in administering, collecting and distributing such taxes, out of which the comptroller shall pay any refunds of such taxes

to which taxpayers shall be entitled under the provisions of this title. The comptroller, after reserving such refund and such costs shall, on or before the twelfth day of each month, pay to the commisioner of finance the taxes penalties and interests imposed by this title, collected by the state tax commission pursuant to this title during the next preceding calendar month. The amount so payable shall be certified to the comptroller by the president of the state tax commission or his delegate, who shall not be held liable for any inaccuracy in such certificate. Where the amount so paid over to the city in any such distribution is more or less than the amount then due to the city, the amount of the overpayment or underpayment shall be certified to the comptroller by the president of the state tax commission or his delegate, who shall not be held liable for any inaccuracy in such certificate. The amount of the overpayment or underpayment shall be so certified to the comptroller as soon after the discovery of the overpayment or underpayment as reasonably possible and subsequent payments and distributions by the comptroller to the city shall be adjusted by subtracting the amount of any such overpayment from or by adding the amount of such underpayment to such number of subsequent payments and distribution as the comptroller and the president of the state tax commission shall consider reasonable in view of the amount of the overpayment or underpayment and all other facts or circumstances.

§ Y46-6.0. *Construction.*

This title shall be construed and enforced in conformity with section four hundred forty-five of the tax law, pursuant to which it is enacted.

§ Y46-7.0. *Separability.* If any provision of this title, or the application thereof to any person or circumstances,

is held invalid, the remainder of this title, and the application of such provisions to other persons or circumstances shall not be affected thereby.

§ 2. This local law shall take effect August first, nineteen hundred eighty; provided, however, that if the tax commission fails to waive the sixty day minimum notice requirement contained in subdivision five of section four hundred forty-five of the tax law or if the notice prescribed therein is not given to the tax commission at least thirty days prior to August first, nineteen hundred eighty, this local law shall take effect on September first, ninteen hundred eighty.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, S.S.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on June 12, 1980, and approved by the Mayor on June 23, 1980.

DAVID N. DINKINS, City Clerk, Clerk of the Council

CERTIFICATION PURSUANT TO MUNICIPAL HOME RULE LAW, SECTION 27

Pursuant to the provisions of Municipal Home Rule Law Section 27, I hereby certify that the enclosed local law (Local Law No. 30 of 1980, Council Int. No. 822), contains the correct text and received the following vote at the meeting of the New York City Council on June 12, 1980: 29 for, 10 against, 2 not voting.

Was approved by the Mayor on June 23, 1980.

Was returned to the City Clerk on June 23, 1980.

ALLEN G. SCHWARTZ, Corporation Counsel.

Notice of Appeal

IN THE

SUPREME COURT OF THE STATE OF NEW YORK

County of Albany

County Clerk's Index No. 7582/80

METROPOLITAN PACKAGE STORE ASSOCIATION, INC., PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

—against—

EDWARD I. KOCH as Mayor of the City of New York, and THE CITY OF NEW YORK and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, ROBERT T. DOYLE as the Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

Notice of Appeal

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 21, 1983

I. Notice is hereby given that METROPOLITAN PACKAGE STORE ASSOCIATION, INC., et al, the plaintiffs-appellants above-named, hereby appeal to the Supreme Court of the United States from the final order of the State of New York Court of Appeals entered in this action on March 29, 1983, leaving standing an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered November 16, 1982, affirming the Judgment of the Supreme Court, Albany County, entered on the 29th day of January, 1982, (1) granting defendants-appellees' motion for summary judgment; (2) denying the motions of plaintiffs-appellants and plaintiffs-intervenors-appellees for summary judgment; and (3) dismissing the complaints of plaintiffs-appellants and plaintiffs-intervenors-appellees.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

II. The Clerk will please prepare a certified copy of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said certified copy the following:

> Remittitur of the Court of Appeals, State of New York including the record on appeal to said Court of Appeals and the order of said Court of Appeals dated March 29, 1983.

III. The following questions are presented by this appeal.

Notice of Appeal

1. Does the Twenty-first Amendment to the Constitution of the United States permit the City of New York to enact local laws violative of other federal constitutional guarantees?

2. Does Local Law No. 30 of 1980 of the City of New York violate Article VI, Cl. 2, of the Constitution of the United States?

3. Does Local Law No. 30 of 1980 of the City of New York violate Article I, Section 8, of the Constitution of the United States?

4. Does Local Law No. 30 of 1980 of the City of New York violate the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States?

5. Does Local Law No. 30 of 1980 of the City of New York violate Article I, Section 10, of the Constitution of the United States?

6. Does Local Law No. 30 of 1980 of the City of New York violate the equal protection clause of the Fourteenth Amendment of the Constitution of the United States?

Dated: New York, New York
June 17, 1983

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Notice of Appeal

TO:

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Albany, New York

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Notice of Appeal

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Judgment of Special Term January 29, 1982

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany at the County Courthouse, City of Albany, State of New York on the 14th day of September, 1981.

Present:

Hon. John H. Pennock, Justice

METROPOLITAN PACKAGE STORE ASSOCIATION, INC., PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs,

—against—

EDWARD I. KOCH as Mayor of the City of New York, and THE CITY OF NEW YORK AND THOMAS LYNCH as President and Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, ROBERT T. DOYLE and DOROTHEA J. KLAJBOR as the Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Plaintiffs-Intervenors.

Judgment of Special Term January 29, 1982

JUDGMENT

Index No. 7582/80

Office of

Albany County Clerk

Albany, N.Y.

Jan 29 11:21 AM '82

Plaintiffs, in this action for a declaratory judgment and an injunction, having moved for an order pursuant to CPLR 3212 striking out the defendants' answer and directing the entry of summary judgment in favor of the plaintiffs for the relief demanded in the complaint on the ground that there is no defense to the action, and the defendants having requested that summary judgment be granted in their favor, and the motions having regularly come on to be heard before me,

AND, after handing down an opinion dated November 5, 1981, which directed that summary judgment be granted to the defendant City of New York, having sua sponte, on December 21, 1981, set the matter down for reargument, and reargument having come on to be heard before me,

NOW, upon reading the Summons and Complaint of the plaintiffs; the Amended Complaint of the intervenor-plaintiffs Ace Wines & Liquor, Inc., *et al.*; the Complaint of the intervenor-plaintiffs Retailers Alliance, Inc., *et al.*; the Answers of the defendants City of New York and Edward I. Koch; the Answers of the State Tax Commission and State Liquor Authority; the plaintiffs' Motion for Summary Judgment, dated August 14, 1981, and the affidavit

of Gerard A. Navagh, dated August 12, 1981, together with the exhibits annexed thereto, in support of the motion; the affidavit of Francis R. Buscemi, dated August 28, 1981 together with the exhibit annexed thereto, in support of the motion; the affidavit of Isaac C. Donner, dated August 28, 1981, together with the exhibits annexed thereto, in opposition to the plaintiffs' motion and in support of a Request for Summary Judgment in favor of the defendants City of New York and Edward I. Koch; the affidavit of Francis V. Dow, dated August 27, 1981, together with the exhibits annexed thereto, in opposition to the plaintiffs' motion and in support of a Request for Summary Judgment in favor of the defendants State Tax Commission; the affirmation of Gerard A. Navagh, dated September 2, 1981, in reply to the defendants' affidavits; the affirmation of FRANCIS R. BUSCEMI, ESQ., dated January 4, 1982, in support of reargument; the affirmation of SEYMOUR HOWARD, ESQ., dated December 31, 1981, in support of reargument; and after hearing GERARD A. NAVAGH, ESQ., attorney for the plaintiffs, SEYMOUR S. HOWARD, ESQ., attorney for plaintiffs-intervenors Ace Wines & Liquors, Inc., *et al.*, and FRANCIS R. BUSCEMI, ESQ., attorney for plaintiffs-intervenors Retailers Alliance, Inc., *et al.*, all in support of the motion; and after hearing ISAAC C. DONNER, ESQ., Special Assistant Corporation Counsel of the City of New York, attorney for defendants City of New York and Edward I. Koch, and FRANCES V. DOW, ESQ., Assistant Attorney General, attorney for the State Tax Commission, both in opposition to the motion and in support of requests for summary judgment in favor of the defendants; and after hearing said GERARD A. NAVAGH, and SEYMOUR HOWARD in support of reargument; and after hearing STANLEY BUCHSBAUM,

ESQ., Special Assistant Corporation Counsel of the City of New York in opposition to reargument; and after due deliberation thereon, it is

ORDERED, that the plaintiffs' motion for summary judgment be and the same hereby is in all respect denied, and it is further

ORDERED AND ADJUDGED, that the defendants' request for summary judgment be and the same hereby is in all respects granted, and it is further

ORDERED, that reargument is granted and, on reargument, the determination directed by the opinion of November 5, 1981, is adhered to, and it is further

ORDERED, ADJUDGED AND DECLARED that:

1) Chapter 406 of the Laws of 1971, as amended by Chapter 433 of the Laws of 1978, and New York City Local Law No. 30 for 1980 are valid and constitutional in all respects.

2) Neither the State Enabling Act nor the Local Law is violative of the Commerce Clause or the Import-Export Clause of the United States Constitution.

3) Neither the State Enabling Act nor the Local Law is violative of the Due Process or the Equal Protection Clauses of the United States Constitution or of such clauses in the New York State Constitution.

4) Neither the State Enabling Act nor the Local Law is unconstitutionally vague or, by reason of delegations of legislative power, violative of due process.

5) Neither the State Enabling Act nor the Local Law is violative of Section 16 or Section 22 of Article III of the New York State Constitution.

Judgment of Special Term January 29, 1982

6) The Local Law is not in conflict with Tax Law, Section 171-a or with Alcoholic Beverage Control Law, Section 101-b or 101-bb.

7) The enactment of the Local Law by the New York City Council without a prior referendum was not violative of Section 39 of the New York City Charter.

8) Neither the State Enabling Act nor the Local Law involve improper price-fixing or improper restraint of trade and neither is violative of the federal Sherman Anti-Trust Act or Robinson-Patman Act or of Article 22 of the New York General Business Law or of any other federal or New York statute relating to restraint of trade or price-fixing.

9) Bulletin No. 529 issued by the New York State Liquor Authority in no way implements the Local Law or the tax imposed by it.

ORDERED, ADJUDGED AND DECREED that the complaints herein, insofar as they seek to restrain and enjoin the defendants from imposing, levying and collecting the tax imposed by Local Law No. 30, are dismissed.

January 22, 1982

ENTER

JOHN H. PENNOCK
J.S.C.

s/ MARY S. LINDSAY
Deputy Clerk
Clerk of the Courts

(Sworn to January 29, 1982)

Opinion in *Mancini* v. *McLaughlin* 54 NY 2nd 860

COURT OF APPEALS

State of New York

October 13, 1981

On Reargument November 24, 1981

54 N.Y.2d 860

FRANK MANCINI, JR.,

Appellant,

v.

EDWARD J. McLAUGHLIN, et al., Constituting the State Liquor Authority,

Respondents.

IN THE MATTER OF

JACK R. BATTIPAGLIA,

Appellant,

v.

NEW YORK STATE LIQUOR AUTHORITY,

Respondent.

Opinion in Mancini v. McLaughlin 54 NY 2d 860

Cross appeals were taken from an order of the Supreme Court, Queens County Edmund J. Wilowski, J., denying State Liquor Authority's cross motion to dismiss claim and petition seeking to enjoin enforcement of bulletin promulgated for purpose of implementing collection of New York City excise tax on liquor. The Supreme Court, Appellate Division, Second Department, 79 A.D.2d 649, 433 N.Y.S.2d 827, reversed, and appeal was taken. The Court of Appeals held that State Liquor Authority exceeded the authority conferred upon it by statute by issuing a bulletin implementing collection of a New York City excise tax on alcoholic beverage consumed within city by requiring wholesalers to pass along the amount of the tax plus a 20 percent markup of such tax to retailers, who were required to include those increases in their minimum resale prices to consumers.

Reversed.

Jasen, Jones and Meyer, JJ., dissented.

Motion for reargument or to amend remittitur granted in part.

Opinion in Mancini v. McLaughlin 54 NY 2d 860

OPINION OF THE COURT

MEMORANDUM

The order of the Appellate Division should be reversed and the relief sought by the appellants granted, with costs.

(1, 2) Before a court can determine whether an agency acted reasonably in taking a particular action it must find that the agency had authority to act in the first instance. In this case neither section 101-b nor any other section of the Alcoholic Beverage Control Law requires that the New York City excise tax or a 20% markup be included in cost, or permits the State Liquor Authority to direct that it be so included. Thus the State Liquor Authority exceeded the authority conferred upon it by statute. Although it appears that the agency's action is meant as a temporary measure, it may not act in excess of its authority even temporarily.

COOKE, C. J. and GABRIELLI, WACHTLER and FUCHSBERG, JJ., concur in memorandum.

JASEN, JONES and MEYER, JJ., dissent and vote to affirm for reasons stated in the memorandum at the Appellate Division (79 A.D.2d 649, 433 N.Y.S.2d 827).

Order reversed, etc.

On Reargument

Motion by State Liquor Authority for reargument or to amend the remittitur granted in the following respects: (1) The remittitur herein is recalled and, when returned,

it will be amended to read as follows: Order reversed, with costs, and the relief sought by the appellants granted to the extent of enjoining respondents from enforcing bulletin 529.

(2) The memorandum is amended to reflect the above limitation in the relief granted to appellants and by adding the following sentence: "We reach only the question of the authority's right to adopt mandatory regulations."

Tax Law

§ 421. *Registration of distributors.* The department of taxation and finance, upon the application of a distributor, shall register such distributor in suitable books to be kept by the department for that purpose. The application shall be in a form and contain such data as the department of taxation and finance shall prescribe. No distributor, unless so registered, shall make any sale of alcoholic beverages within this state, except a sale, if any, as to which this state is without power to impose such condition.

§ 422. *Bonds of distributors.* The tax commission may require any distributor to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in the state, in such amount as the tax commission may fix, to secure the payment of any sums due from such distributor pursuant to this article. The tax commission may require that such a bond be filed before a distributor is registered, or at any time when in its judgment the same is necessary as a protection to the revenues under this article. In lieu of such bond, a distributor may deposit securities approved by the tax commission, in such amount as it may prescribe, which securities shall be kept in the joint custody of the comptroller and the commissioner of taxation and finance and may be sold by the tax commission if it becomes necessary so to do in order to recover any sums due from such distributor pursuant to this article; but no such sale shall be had until after such distributor shall have had opportunity to litigate the validity of any tax if it elects so to do. Upon any such sale, the surplus, if any,

above the sums due under this article, shall be returned to such distributor.

* * *

§ 426. *Records to be kept by distributors, owners and others.* Every distributor, owner or other persons shall keep a complete and accurate record of all purchases and sales or other dispositions of alcoholic beverages, and a complete and accurate record of the number of gallons of beers produced, manufactured, brewed or fermented and liters of all other alcoholic beverages produced, distilled, manufactured, brewed, compounded, mixed or fermented. Such records shall be in such form and contain such other information as the tax commission shall prescribe. Said commission, by rule or regulation, also may require the delivery of statements to purchasers of alcoholic beverages, and prescribe the matters to be contained therein. Such records and statements, unless required by the tax commission to be preserved for a longer period, shall be preserved for a period of one year and shall be offered for inspection at any time upon oral or written demand by the commissioner of taxation and finance or his duly authorized agents, and every such distributor, owner or other person shall make such reports to the department of taxation and finance as may be required by the tax commission. Nothing in this section contained shall be construed to require the keeping of a record of the purchase or disposition of alcoholic beverages by a consumer thereof, except by a person who uses the same for commercial purposes, or of the sale of alcoholic beverages at retail.

§ 427. *Exception from retail sales tax.* (Now obsolete.)

Tax Law

§ 428. *Records and reports of transportation.* Every person transporting alcoholic beverages within this state, whether such transportation originates within or without this state, when required by the tax commission, shall keep a true and accurate record of all alcoholic beverages so transported, showing such facts with relation to such alcoholic beverages and their transportation as the tax commission may require. Such record shall be open to inspection by the reperesentatives of the department of taxation and finance at any time and the tax commission may require from any such person returns of all or any part of the information shown by such records.

* * *

§ 432. *Tax to be paid but once; foreign and interstate commerce; injunction.* Nothing in this article shall be construed to require the payment to the department of taxation and finance of the taxes imposed by this article more than once on any quantity of alcoholic beverages sold or used within this state. No provision of this article shall apply or be construed to apply to foreign or interstate commerce, except in so far as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. The supreme court shall have jurisdiction to restrain the department, by injunction, from collecting a tax under this article upon any sale as to which, by reason of the United States constitution and the laws of the United States enacted pursuant thereto, such a tax cannot be imposed.

§ 433. *Penalties.* * * *

* * *

2. Any distributor or owner who or which files or causes to be filed any return or statement, required or permitted by this article, which is wilfully false shall be guilty of a felony.

• • •

§ 445. Local taxes on beer and liquor by a city of one million or more.

• • •

4. • • • Nothing in this article which requires payment of both state and local taxes to the tax commission shall be construed as the payment of either tax more than once.

• • •

Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.,; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

-against-

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., et al. as Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, et al. as Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., et al. and RETAILERS ALLIANCE, INC., et al.,

Intervenors-Appellees.

On Appeal from the Court of Appeals
of the State of New York

MOTION TO DISMISS, OR TO AFFIRM

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	2
New York Statutes Involved and Statutory Background	4
Enabling Act	4
Local Law No. 30	6
State Liquor Authority Bulletin No. 529	10
Statement of Case	12
FACTS	14
POINT I:	
THE CITY TAX, AS SPECIFICALLY AUTHORIZED AND REQUIRED BY THE ENABLING ACT, IS IMPOSED NOT ONLY UPON IMPORTERS OF BEER AND LIQUORS, BUT ALSO UPON PERSONS ACQUIRING, OR PRODUCING, MANUFACTURING, BREWING, DISTILLING, ETC. BEER AND LIQUORS WITHIN THE CITY. AND IT IS IMPOSED ON A WHOLLY LOCAL TRANSACTION, THAT IS, THE SALE OR USE OF BEER OR LIQUORS WITHIN THE CITY. HENCE, APPELLANTS' CONTENTION THAT THIS TAX VIOLATES THE IMPORT-EXPORT CLAUSE AND THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IS WITHOUT SUBSTANCE OR MERIT.	21

Page

POINT II:

INSOFAR AS BASED UPON VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES, THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION SINCE IT IS NOT BASED UPON REPUGNANCE OF LOCAL LAW NO. 30 TO THOSE CONSTITUTIONAL PROVISIONS. IN ANY EVENT, IT SHOULD BE DISMISSED FOR FAILURE TO PRESENT A SUBSTANTIAL CONSTITUTIONAL ISSUE. 27

POINT III:

THE SUPREMACY CLAUSE AND THE XXI AMENDMENT OF THE FEDERAL CONSTITUTION ARE WHOLLY IRRELEVANT HERE. APPELLANTS' CONTENTIONS THAT THE LOCAL LAW VIOLATES THOSE PROVISIONS ARE WHOLLY WITHOUT SUBSTANCE. ... 34

CONCLUSION 36

APPENDIX:

New York State Tax Law:

§420, subd. 4 ..... 1aa

§424, subd. 1(a)-(f) 2aa

§445 ..... 3aa

Page

TABLE OF CASES

Community Communications Co. v. Boulder, 455 U.S. 40 (1982) ... 35

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 24

Cunard Steamship Co. v. Mellon, 262 U.S. 100 (1923) 30

Guaranty Trust Co. v. Blodgett, 287 U.S. 509 (1933) 23

House of Seagram v. State Liq. Auth., 25 NY 2d 865 (1969), affg. on op. of App. Div., 30 AD 2d 380 (3rd Dept., 1968), app. dsm. and cert. den., 396 U.S. 121 (1969) .. 22

House of York, Ltd. v. Ring, 322 F. Supp. 530 (D.C.N.Y., 1970) 22

Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959) 23

Lash's Products Co. v. United States, 278 U.S. 175 (1929) 28

Mancini v. McLaughlin, 54 NY 2d 860 and 863 (1981) .. 10 fn, 17 fn, 35

McGoldrick v. Berwind White Co., 309 U.S. 33 (1940) 24

Metropolitan Package Store v. Koch, 89 AD 2d 317 (3rd Dept., 1982), affd. 58 NY 2d 1112 (1983) ..... 3, 17 fn, 22, 24, 29, 36

Page

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), reh. den. 424 U.S. 935 (1976) 24

People ex rel. Knott Corp. v. Graves, 286 N.Y. 377 (1941) ..... 7 fn

Sonneborn Bros. v. Cureton, 262 U.S. 506 (1923) 30

Southern Pacific v. Gallagher, 306 U.S. 167 (1939) 25

Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734 (1978) . 24

Wiloil Corp. v. Pennsylvania, 294 U.S. 169 (1935) 25

Woodruff v. Parham, 8 Wall. (U.S.) 123 (1868) ..... 30 fn

STATUTES

Federal Constitution:

Commerce Clause .... 13, 14, 21, 23 fn

Due Process Clause of the Fourteenth Amendment .. 13, 15, 27, 37

Equal Protection Clause of the Fourteenth Amendment 13, 15, 27, 37

Import-Export Clause ..... 13, 14, 21, 23, 23 fn

Supremacy Clause ... 13, 15, 34, 37

Page

Twenty-First Amendment 13, 15, 34, 36, 37

Federal Statutes:

28 U.S.C. §1257, subd. 2 ..... 2, 28, 32

New York State Laws:

Chapter 142 of 1933 5

Chapter 242 of 1970, §1 ..... 9 fn

Chapter 242 of 1970, §8 ..... 9 fn

Chapter 406 of 1971 ..... 3, 5

Chapter 5 of 1972, §2(b) ..... 7 fn

Chapter 433 of 1978 3

New York State Alcoholic Beverage Control Law: ..... 10, 19 fn

§101-b, subds. 1, 2 11

§101-b, subds. 3(a),(b) 11

State Liquor Authority Bulletin No. 529 ..... 10, 11, 17, 18, 19 fn, 20, 27, 28, 32, 35

New York State Tax Law:

Article 18 ..... 4, 5, 6, 16, 19 fn

§420, subd. 4 ..... 8, 23 fn

§421 ..... 9 fn, 25, 32

Page

§422 ..... 9 fn, 25, 32

§424, subd. 1 ..... 5, 6, 23 fn

§425 ..... 9, 9 fn, 30, 31

§426 25

§428 25

§433 25

§445 ..... 3, 4, 5, 6, 36

§445, subd. 1 ..... 5, 6

§445, subd. 2 ..... 5, 6

§445, subd. 3 ..... 5, 8, 9

§445, subd. 4 ..... 5, 6, 19 fn

New York City Local Law:

No. 30 of 1980 .. 3, 4, 6, 7, 12, 16, 17, 18, 19, 19 fn 27, 28, 29, 30, 32, 34

New York City Administrative Code:

§Y46-1.0, subd. 6 ..... 8, 22, 23 fn

§Y46-2.0, subd. (a) ..... 23 fn, 24

§Y46-2.0, subd. (a)(1) 7

§Y46-2.0, subd. (a)(2) 7, 21

§Y46-2.0, subd. (b) 7

Page

§Y46-3.0 9

§Y46-4.0 ..... 19 fn

§Y46-6.0 4

TEXTS

John F. Due, State and Local Sales Taxation: Structure and Administration (1971) ..... 26 fn

Lennox Lee Moak and Frank Coward, Jr., Manual of Suggested Practices for Administration of Local Sales and Use Taxes (1961) ..... 26 fn

No. 82-2125

IN THE

SUPREME COURT OF THE UNITED STATES

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

-against-

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION; and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., et al. and RETAILERS ALLIANCE, INC., et al.,

Intervenors-Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION OF DEFENDANTS-APPELLEES KOCH AND THE CITY OF NEW YORK, AND TULLY et al. AS MEMBERS OF THE NEW YORK STATE TAX COMMISSION TO DISMISS OR AFFIRM

Appellees move to dismiss the appeal or, alternatively, to affirm the order appealed from: (1) for lack of jurisdiction under 28 U.S.C. §1257(2) of Questions I, II, IV, and VI stated in the Jurisdictional Statement, and (2) on the grounds that the appeal on all the questions stated therein present no substantial federal question, and that the questions presented are so manifestly unsubstantial as not to need further argument.

PRELIMINARY STATEMENT

Appellants appeal from an order of the Court of Appeals of the State of New York dated March 29, 1983 (2a-3a)* which granted the motion of the Appellees to dismiss the appeals taken by the Appellants, and from an order of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, entered November 16, 1982, on the

* Page references designated "-a" refer to pages in Appellants' Jurisdictional Statement.

ground that no substantial constitutional question was directly involved (1a-3a).

The Appellate Division order affirmed the judgment of the Supreme Court, Albany County, dated January 29, 1982, that denied Appellants' motion for summary judgment, granted summary judgment to Appellees and dismissed the complaint insofar as it sought an injunction. The order of the Appellate Division was based upon its opinion in which it discussed and rejected each of the constitutional contentions raised by Appellants here (20a-32a).

The judgment declared the City's Local Law No. 30 of 1980 (33a-42a) and State Tax Law §445, its Enabling Act (Ch. 406 of 1971, amend. Ch. 433, L. 1978), pursuant to which the Local Law was enacted, to be in all respects valid and constitutional.

The decision of the Court of Appeals (1a) is reported in 58 NY 2d 1112. The opinion of the Appellate Division (20a-32a) is reported in 89 AD 2d 317.

New York Statutes Involved

A copy of the City's Local Law No. 30 of 1980 is annexed to Appellants' Jurisdictional Statement (33a-42a).

Tax Law Article 18, §445, a copy of which is in the attached Appendix (pp. 3aa-6aa)* is the Enabling Act, pursuant to which the City enacted Local Law No. 30 (N.Y.C. Adm. Code, §Y46-6.0). Since the Enabling Act expressly provides that all the provisions of Tax Law Article 18 shall apply to the City taxes authorized by §445, we here summarize, in broad outline, the provisions of the said statutes and the interrelationship between the provisions thereof, which are essential to consideration of the issues involved in this appeal.

Enabling Act

Tax Law Article 18 imposes State excise taxes on distributors of alcoholic

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* Page references designated "-aa" refer to pages in Appellees' appendix.

beverages (beers, wines and liquors) sold or used within the State [§424, subd. 1(a)-(f). See 2aa], and has been in force since 1933 (L. 1933, Ch. 142).

In essence, §445, added as an amendment to Tax Law Article 18 in 1971, (L. 1971, Ch. 406), authorizes the City to impose taxes similar to the State's taxes on alcoholic beverages at specified rates, but limited to beers and liquors (no wines) and to transactions occurring within the territory of the City (§445, subds. 1, 2; cf. §424, subd. 1). Section 445 also provides that all the provisions of Article 18, so far as they can be made applicable, shall apply to the taxes the City is authorized to impose, modified so as to adapt them to local instead of State taxes, and that the words "this state" in such provisions are to be read as "this city" for purposes of the City taxes authorized (§445, subds. 3, 4).

This Enabling Act also directs that the taxes imposed pursuant to its authority shall be administered and collected by the State Tax Commission (Tax Commission) in the same manner as are the State's taxes imposed by Article 18, and that the Tax Commission shall make provision for joint administration and collection of both these State and local taxes (§445, subd. 4).

The clear intention and effect of these provisions are obviously that on every beer or liquor transaction, the sale or use of which within the City is subject to the State taxes under Article 18, the City is permitted to impose its authorized taxes; and that the Tax Commission, when collecting the State taxes on such City transaction, is also to collect the City taxes.

Local Law No. 30

As authorized by Tax Law §445 [subds. 1, 2; cf., Tax Law §424, subd. 1], Local

Law No. 30 imposes an excise tax upon distributors* of a specified sum per gallon of beer and per liter of liquor sold or used within the City [N.Y.C. Admin. Code §Y46-2.0, subds. (a)(1), (2); 36a]. It also imposes a one-shot "floor tax" upon persons other than distributors who, on the effective date of the tax, own or possess beer and liquors for purposes of sale [id., subd. (b); 37a].**

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* This tax is also imposed on "noncommercial importers." None of the Appellants is a noncommercial importer, and only one of them, Grant, is a distributor.

** The "floor tax" on persons who are not distributors is intended to prevent such persons, (retailers, for example), who had made purchases before the effective date of the local tax law, from obtaining competitive advantage as against retailers who have borne the burden of the tax in the price charged them, and to prevent evasion of the sales tax by those who made such purchases before the effective date to escape the tax [see L. 1972, Ch. 5, §2(b); People ex rel. Knott Corp. v. Graves, 286 N.Y. 377, 379 (1941)].

A "distributor", so far as pertinent, is defined as follows (N.Y.C. Adm. Code, §Y46-1.0, subd. 6; 34a):

"6. 'Distributor.' Any person who imports or causes to be imported into this city any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this city who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufactures, brews, compounds, mixes or ferments any alcoholic beverages within this city for sale. ...."

The aforesaid provisions of the Local Law are in full conformity with the Enabling Act (see Tax Law §445, subd. 3); and the definition of "distributor" in both laws is identical (see §420, subd. 4; laa).

Appellants contend that the retailer Appellant falls within this Local Law's definition of "distributor" because he "imports" liquor into the City but is denied equal protection and due process because he is not treated as a distributor.

As to this, the following statutory provision is pertinent.

Tax Law §425* which is made applicable to the City's liquor tax law by the Enabling Act (Tax Law §445, subd. 3) and by the Local Law (Adm. Code §Y46-3.0), reads, so far as pertinent, as follows (with the necessary changes substituting "city" for "state" to make it applicable to the City):

"If a person shall receive any alcoholic beverages from a distributor, upon which alcoholic beverages this [state] city was without power to impose the taxes under this [article] title against such

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* Tax Law §425 was intended to prevent evasion or avoidance of the tax by persons, such as retailers, buying outside the State (or City, as to the City's tax). See, L. 1970, Ch. 242, §1). However, it merely subjects such persons to the same tax burden, but does not make them "distributors". To qualify as such a retailer would have to register and furnish a surety bond. (See Tax Law §§421, 422). See amendments to §425, enacted by L. 1970, Ch. 242, §8. None of the retailers in this action have so qualified.

distributor, and such person shall thereafter sell or use any such alcoholic beverages in such manner and under such circumstances as may subject the same to the taxing power of this [state] city with respect to such sale or use, such person shall be liable for the tax imposed by section [four hundred twenty-four] Y46-2.0, subdivision (a) with respect to such sale or use, and shall make the same reports and returns, pay the same taxes and be subject to all other provisions of this [article] title relating to distributors ...."

Bulletin No. 529 of State Liquor Authority

Although the Jurisdictional Statement does not set forth or describe Bulletin No. 529 issued by the State Liquor Authority (SLA), Appellants rely heavily upon that Bulletin (See, ii, iii, 7, 8, 9, 11).*

The following facts as to the background, purposes and contents of the Bulletin are pertinent here.

SLA was established to administer the State Alcoholic Beverage Control (ABC)

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* This despite the fact that Appellants recognize (ii, 8) that the Bulletin has been held invalid. Mancini v. McLaughlin, 54 NY 2d 860 and 863 (1981).

Law, which was enacted to promote temperance by regulating the sale of alcoholic beverages by controlling and fixing the sales prices thereof and prohibiting price discrimination in their sales (ABC Law §101-b, subds. 1, 2). Wholesalers are required to post with SLA schedules of their prices charged to retailers for every item of liquor they sell. They are required to charge the posted prices to all retailers without discrimination, and the prices cannot be changed except by posting new schedules upon the basis of increases or decreases in operating expenses with SLA permission, or without such permission upon the basis of increases or decreases in taxes [id., subds. 3(a), (b)].

Bulletin No. 529 was issued by SLA, after conferences had with wholesalers on questions they raised as to how they were to increase their prices to retailers to include the tax imposed by Local Law No.

30, in view of the facts: (1) that the tax affected only New York City while scheduled prices were to be statewide; and (2) that there was not sufficient time before August 1, 1980, the effective date of the Local Law, for them to prepare and post the new schedules of increased prices.

The Bulletin directed that, by a future date to be fixed by SLA, the wholesalers-distributors would have to post their revised price schedules, but until that time, without revised price schedules posted, all wholesalers-distributors, on their sales only to New York City retailers, had to increase their prices by the amount of the City tax, plus a markup of 20% thereof, and City retailers' prices to consumers were to be similarly increased.

Statement of Case

Appellants, a New York State wholesale liquor dealer and a retail liquor dealer, each licensed by New York State, and an Association of licensed retail

liquor dealers, all doing business in the City of New York, brought this action for a judgment declaring the tax, imposed by the City of New York upon distributors of liquor sold or used by them within the City, to be invalid on a wide variety of grounds, including specifically unconstitutionality under the Import-Export, Commerce, Equal Protection, Due Process and Supremacy Clauses, and the Twenty-First Amendment of the federal constitution. The Supreme Court, Albany County, denied Appellants' motion for summary judgment, granted summary judgment to Appellees, and entered judgment declaring the City tax to be in all respects valid and constitutional (48a-52a).

Upon appeal to the Appellate Division of the Supreme Court, Third Department, the said judgment was affirmed (32a). Appellants appealed to the Court of Appeals, on constitutional grounds, from

the said order of the Appellate Division affirming the judgment of the lower Court. The Court of Appeals granted Appellees' motion to dismiss the said appeal on the ground that no substantial constitutional question was directly involved (1a-3a).

FACTS

Because we believe that Appellants' recital of facts and issues is inaccurate and misleading in important respects we shall state the pertinent facts as set forth in the pleadings and affidavits submitted on the motion for summary judgment.

Appellants' Complaint and Papers Submitted on Motion for Summary Judgment.

In their complaint Appellants assert that the City tax law violates a wide variety of federal and state constitutional provisions, including the Import-Export Clause, the Commerce Clause, the

Due Process Clause, the Equal Protection Clause, the Supremacy Clause and the Twenty-First Amendment of the federal constitution, that they seek to rely on here.

The following are the only facts pertinent to the issues appearing in the Appellants' complaint and supporting affidavits.

The Association plaintiff is an association of licensed retail liquor dealers doing business in the City of New York. The plaintiff William Grant & Sons, Inc. (Grant) is a wholesale-distributor licensed to import wines and liquors into the United States with a place of business in New York City, where it has an office and employees and where it takes orders from New York City and Westchester retailers, which it fills by truck to the New York City Metropolitan area. It also holds an SLA wholesale liquor license authorizing it to sell liquor in New York State at the same New

York City address, and has registered as a distributor under the State Liquor Tax Law (Tax Law Article 18), and has paid the State and City liquor taxes since August 1, 1980.

The plaintiff Paul Wayne is a licensed retail liquor store operator in the City of New York where he sells "imported" liquor although he does not state he himself imports any liquors from abroad. The amounts of State and City liquor taxes are included in the seller's price of liquor sold to him. He alleges that he paid the City tax under protest.

For the rest, the complaint and supporting affidavits are devoted to Appellants' inaccurate version and interpretation of the provisions of City Local Law

No. 30, and to SLA Bulletin No. 529.* They elaborate Appellants' views of the meaning and effect of the said Bulletin in allegedly "implementing" the City's Local Law No. 30 so that the nature and incidence of the City's tax was altered from one on the distributor to one on the retailer which the distributor was required to collect from the retailer. They assert further that the Bulletin was the result of a price-fixing agreement between SLA and certain wholesalers - one made in collaboration with private citizens, not

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* Appellants admit (ii, 8), that the Court of Appeals has held that Bulletin No. 529 invalid and enjoined SLA from enforcing it. (Mancini v. McLaughlin, 54 NY 2d 860 (1981). And the Appellate Division in the instant case determined that the Bulletin was invalid and that all issues based thereon are rendered ineffective and are eliminated (89 AD 2d, at 324; 26a-27a). Nevertheless, Appellants on this appeal rely upon it, and their erroneous version of the effect thereof (ii, iii, 7-9, 11).

with or by the City or the Tax Commission, and that SLA acted illegally in promulgating the Bulletin.

Thus, appellants' action is largely based upon this invalid SLA Bulletin 529, and their distortion of the effect of the Bulletin upon the City's Local Law No. 30.

Appellees' Answers and Papers Submitted on Motion for Summary Judgment.

The Appellees' answers set forth general denials of the allegations of the complaint, and set up affirmative defenses alleging that Local Law No. 30 was enacted in conformity with authority granted by the State Enabling Act, and that SLA had no authority and did not intend to "implement" the Local Law, and that Bulletin 529

cannot and did not affect the tax imposed by the Local Law.*

The affidavits in opposition also point this out, and in an affidavit, counsel for SLA stated that SLA had not undertaken to implement Local Law No. 30.

These affidavits point out further that there are no facts in the moving papers to support Appellants' claim that the Local Law was part of a price-fixing-restraint-of-trade agreement. Moreover, the facts stated in the affidavits of

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* SLA was set up to administer the State ABC Law, a statute enacted to regulate the liquor trade (see, supra, p. 10-11). The State liquor tax law (Tax Law, Art. 18) and City liquor tax law (L.L. No. 30) are purely revenue measures, the administration of which is expressly lodged in the State Tax Commission. (Tax Law, §445, subd. 4; Admin. Code, §Y46-4.0). It is clear, therefore, that SLA had no authority to "implement" or act with respect to those liquor taxes by Bulletin No. 529 or otherwise. Hence, regardless of whether or not Bulletin No. 529 was a valid regulation by SLA in administering the ABC Law, it could not and did not affect Local Law No. 30.

three City and two State employees who, as observers, attended the meeting at which Appellants asserted that the alleged agreements were arranged, established that no one on behalf of the City or the Tax Commission, participated in or consented to any price-fixing or restraint-of-trade agreements, or in the promulgation of Bulletin No. 529. These facts are nowhere questioned or denied by Appellants.

POINT I

THE CITY TAX, AS SPECIFICALLY AUTHORIZED AND REQUIRED BY THE ENABLING ACT, IS IMPOSED NOT ONLY UPON IMPORTERS OF BEER AND LIQUORS, BUT ALSO UPON PERSONS ACQUIRING, OR PRODUCING, MANUFACTURING, BREWING, DISTILLING, ETC. BEER AND LIQUORS WITHIN THE CITY. AND IT IS IMPOSED ON A WHOLLY LOCAL TRANSACTION, THAT IS, THE SALE OR USE OF BEER OR LIQUORS WITHIN THE CITY. HENCE, APPELLANTS' CONTENTION THAT THIS TAX VIOLATES THE IMPORT-EXPORT CLAUSE AND THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IS WITHOUT SUBSTANCE OR MERIT.

(1)

The contention that the City tax violates the Import-Export and the Commerce Clauses applies only to the Appellant Grant, the only wholesale distributor among Appellants.

The City's tax is imposed upon distributors when liquor is "sold or used within this city" [N.Y.C. Adm. Code, §Y46-2.0, subd. (a)(2);]. A "distributor" is defined to include not only importers, but

also persons acquiring alcoholic beverages stored in the City, as well as persons producing them within the City. (N.Y.C. Adm. Code, §Y46-1.0, subd. 6; 34a, quoted supra, p. 8).

In construing these provisions the State courts have held that the tax is imposed upon a purely local event - the sale or use of the beer or liquor within the City after they have come to rest in the City - and not on the transportation or shipment thereof; and that it is imposed without discrimination upon the sale in the City of such goods, not only on importers, but also on persons acquiring or producing them. (24a-26a; 89 AD 2d, at 322). See also House of Seagram v. State Liq. Auth., 25 NY 2d 865 (1969), affg. on op. of App. Div. 30 AD 2d 380 (3rd Dept., 1968), app. dsm. and cert. den., 396 U.S. 121 (1969), and House of York, Ltd. v. Ring, 322 F. Supp. 530

(D.C.N.Y., 1970), in which cases the New York State court and the three-Judge federal district court sustained the New York State liquor tax, counterpart of the City liquor tax, against similar attack.*

This construction of the City Tax Law is binding upon this Court on this appeal. Guaranty Trust Co. v. Blodgett, 287 U.S. 509, 513 (1933); Kingsley Pictures Corp. v. Regents, 360 U.S. 684, 688 (1959).

That such a tax does not offend any of the three policy considerations underlying the Import-Export Clause and does

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* The State tax is imposed in language identical to that of the City tax law upon distributors, who are defined in the State Tax Law identically as in the City Tax Law [cf. Tax Law §424, subd. 1 and §420, subd. 4 with N.Y.C. Adm. Code §Y46-2.0, subd. (a) and §Y46-1.0, subd. 6]. Hence, if the City tax were violative of the Import-Export and Commerce Clauses, then the State Tax Law too would be invalid. The fact that Appellants attack only the City tax and fail to attack the identical State tax which also affects them in precisely similar fashion suggests the lack of merit in this appeal.

not violate that Clause has been firmly established by this Court. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976), reh. den. 424 U.S. 935 (1976); Washington Rev. Dept. v. Stevedoring Assn., 435 U.S. 734, 751-761 (1978). These cases were cited and relied on by the Appellate Division herein in upholding the constitutionality of the City tax (24a; 89 AD 2d, at 322).

(2)

The City tax is imposed only upon goods "when sold or used within" the City [N.Y.C. Adm. Code, §Y46-2.0, subd. (a)], and the State Court has so held (see 25a; 89 AD 2d, at 323). Such a tax does not violate the Commerce Clause, Washington Rev. Dept. v. Stevedoring Assn., supra, at 734-751; Complete Auto Transit Inc. v. Brady, 430 U.S. 274 (1977); McGoldrick v. Berwind White Co., 309 U.S. 33, 49-52

(1940); Southern Pacific v. Gallagher, 306 U.S. 167, 171-172, 178 (1939); Wiloil Corp. v. Pennsylvania, 294 U.S. 169, 174-175 (1935).

(3)

Appellants' assertions in their Jurisdictional Statement that the tax intercepts Grant's imports, and is a "custom type tax" (i, 10), are wholly without support in law or by the facts in the record.

And Appellants' assertion that State Tax Law §§421, 422, 426, 428, and 433* impose unconstitutional burdens on interstate commerce (ii) are also without merit. In the first place, as we have seen, the State and the City taxes apply

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* These provisions require distributors to register, to furnish security for payment of the taxes, to keep records and make reports, and impose penalties for failure to file returns or for violating the tax law or regulations (57a-60a).

only to intrastate incidents. Moreover, provisions such as these for facilitating administration and collection of the taxes are standard and commonplace features of sales tax laws.*

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* See, John F. Due, State and Local Sales Taxation: Structure and Administration, (Public Administration Service, 1971), pp. 15, 134-136 (registration), 203-206 (bonding), 190-191 (criminal penalties); Lennox Lee Moak and Frank Cowan, Jr., Manual of Suggested Practices for Administration of Local Sales and Use Taxes, (Municipal Finance Officers Assn. of the U.S. and Canada, 1961), p. 53 (records and reports).

POINT II

INSOFAR AS BASED UPON VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES, THE APPEAL SHOULD BE DISMISSED FOR LACK OF JURISDICTION SINCE IT IS NOT BASED UPON REPUGNANCE OF LOCAL LAW NO. 30 TO THOSE CONSTITUTIONAL PROVISIONS. IN ANY EVENT, IT SHOULD BE DISMISSED FOR FAILURE TO PRESENT A SUBSTANTIAL CONSTITUTIONAL ISSUE.

Appellants' assertion of denial of equal protection and due process appears to be based upon the alleged effect upon retailers of the void Bulletin No. 529 (iii, 8, 10, 11).

Due Process

A. The Jurisdictional Statement states no claim of a violation of due process by Local Law No. 30; the violation asserted is based solely upon the alleged effect of Bulletin No. 529 in causing illegal payments of a 20% markup to be made by retailers to wholesalers (iii, 8, 10, 11).

There is, therefore, no issue presented here by Appellants of violation of due process by Local Law No. 30. Hence, the appeal on due process grounds must be dismissed for lack of jurisdiction (28 U.S.C. §1257, subd. 2).

B. In any event, the Local Law does not require retailers to make any tax or other payments to wholesalers (the distributors); the tax is imposed only on the distributors. Any payments by retailers to wholesalers made pursuant to Bulletin No. 529, were obviously payments of part of the price charged the retailers by the wholesalers, and are not tax payments required or made pursuant to Local Law No. 30. See, Lash's Products Co. v. United States, 278 U.S. 175 (1929).

Equal Protection

A. Appellants' claim of equal protection violation is also based upon Bulletin No.

529, and thus also fails to present any issue of such violation by Local Law No. 30.

As appears from the opinion of the Appellate Division (28a; 89 AD 2d at 325), Appellants claim denial of equal protection because, when City retailers bring into the City liquor they purchase from distributors at out-of-city points, such as New York State localities bordering the City or from New Jersey, they "import" such liquor into the City and thereby qualify as "distributors" as defined in the Local Law, but that they are not recognized or treated as such under the Local Law.

There is no merit to this contention, since the State courts have construed the word "import" in the Local Law's definition of "distributor" to refer "to transactions in foreign commerce not interstate commerce" (28a; 89 AD 2d

at 325).* Therefore, retailer Appellants do not "import" into the City such purchases from out-of-City distributors, and do not fall within the definition of "distributor" upon whom the City's tax is imposed.

They are, thus, not subjected to any tax as distributors by Local Law No. 30. Since one cannot claim denial of equal protection because one is not subjected to a tax, there is here obviously no basis for Appellants' claim of such denial. Tax Law §425 subjects persons (including retailers) buying liquor from out-of-City distributors, to a tax upon their subsequent sale of the liquor within the City, in accordance with the pro-

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* This is also the meaning of the word in its ordinary sense and in common usage. See, Woodruff v. Parharm, 8 Wall. (U.S.) 123 (1868); Cunard Steamship Co. v. Mellon, 262 U.S. 100, 122 (1923); Sonneborn Bros. v. Cureton, 262 U.S. 506, 509-512 (1923).

visions of the Local Law relating to distributors. This is, of course, not a tax on retailers as distributors.

The purpose of §425 is the same as that of the "floor tax" (see supra, p. 7), that is, to deprive such retailers, who may have avoided or evaded the financial burden of the tax by buying out of the City, of a competitive advantage by subjecting them to substantially the same financial burden vis-a-vis the tax as is borne by retailers who purchased liquor from distributors within the City. This purpose is to equalize the burden borne by all City retailers and to eliminate such financial advantage.

However, from the Jurisdictional Statement, it appears that Appellants' claim of "discrimination" in violation of equal protection is based, as is their claim of due process violation, upon an

alleged unconstitutional burden of paying the 20% markup imposed by SLA Bulletin No. 529 (8, 11).

Since this does not present an issue of violation of equal protection by Local Law No. 30, this appeal on that ground must be dismissed for lack of jurisdiction (28 U.S.C., §1257, subd. 2).

B. Aside from this, no facts were presented by Appellants in support of their motion for summary judgment, that any retailers had actually bought liquor outside the City which they had brought into the City, as to which they were subjected to discriminatory treatment. They do not claim that they had qualified as distributors as required by law (see Tax Law §§421, 422; see 57a) and had been treated differently from distributors who had so qualified. Nor do they claim that they were treated differently from other retailers

who had purchased liquors from out-of-City distributors, nor that they were subjected to greater tax burden than that imposed upon retailers purchasing from distributors within the City.

Hence, aside from lack of jurisdiction, Appellants' claim of denial of equal protection should be dismissed for lack of merit and substance.

POINT III

THE SUPREMACY CLAUSE AND THE XXI AMENDMENT OF THE FEDERAL CONSTITUTION ARE WHOLLY IRRELEVANT HERE. APPELLANTS' CONTENTIONS THAT THE LOCAL LAW VIOLATES THOSE PROVISIONS ARE WHOLLY WITHOUT SUBSTANCE.

(1)

The alleged violation of the Supremacy Clause is based upon Appellants' contention of alleged violation of federal antitrust and price-fixing laws (ii, 8).

So far as Local Law No. 30 is concerned, there is no question presented of the supremacy of these statutes. They are not here involved because the Local Law is clearly, on the face of it, purely a revenue measure; it does not in any way attempt to regulate business or to fix prices.

Moreover, Appellants assert that the agreement on which their claim of Supremacy Clause violation is based is SLA Bul-

letin 529. They state that "Bulletin 529 constitutes a price-fixing agreement between the State Liquor Authority and certain wholesalers" (ii, 8), and that the Bulletin "was issued at the request of wholesalers" (9). There is no claim that the City was party to such an agreement.*

And aside from the fact that the Bulletin has been held invalid and of no effect (Mancini case, supra), there is no basis for Appellants' assumption that the SLA illegal action with respect to the Bulletin affects the City's Local Tax Law nor for attributing SLA's illegal action to the City or the Tax Commission.**

Community Communications Co. v. Boulder, 445 U.S. 40 (1982), sought to

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* The facts in the record, moreover, show, that the City was not a party (see, supra, pp. 17-18, 19-20).

** See footnote p. 19, supra.

be relied on by Appellants (ii, 9), is inapposite. The ordinance there involved was not a tax measure, but one regulating business, to which the antitrust laws are addressed.

(2)

Nor is there any question here presented involving the XXI Amendment. The Local Law does not, as is clear by a mere reading thereof, in any way affect the transportation or importation of liquor into the State. Nor does it in any way regulate the liquor business, nor violate any of the State laws. Indeed the City's tax law is expressly authorized by its Enabling Act, Tax Law §445. (32a; 89 AD 2d, at 328).

CONCLUSION

The appeal from the order of the Court of Appeals of the State of New York should be dismissed, with respect

to Questions I (Twenty-First Amendment), II (Supremacy Clause), IV (Due Process), and VI (Equal Protection), stated in the Jurisdictional Statement, for lack of jurisdiction of this Court, and, in any event, as to all questions presented therein, the appeal from the said order should be dismissed, or in the alternative affirmed, for failure to present a substantial federal question.

Dated: August 16, 1983

Respectfully submitted,

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APPENDIX

New York State Tax Law

S 420. Definitions

As used in this article:

* * * *

4. "Distributor" means any person who imports or causes to be imported into this state any alcoholic beverages which are or will be offered for sale or used for any commercial purpose; any purchaser of warehouse receipts for alcoholic beverages stored in a warehouse in this state who causes such beverages to be removed from such warehouse; and also any person who produces, distills, manufactures, brews, compounds, mixes or ferments any alcoholic beverages within this state for sale, ***.

New York State Tax Law

§ 424. Taxes imposed

1. There are hereby levied and imposed on a distributor and a non-commercial importer excise taxes at the following rates:

(a) Four and four-ninths cents per gallon upon beers;

(b) Two and six-tenths cents per liter upon still wines, except cider containing more than three and two-tenths per centum of alcohol by volume, upon which the tax shall be four-tenths of a cent per liter;

(c) Seven cents per liter upon artifically carbonated sparkling wines, except artifically carbonated sparkling cider containing more than three and two-tenths per centum of alcohol by volume, upon which the tax shall be four-tenths of a cent per liter;

(d) Fourteen and one-tenth cents per liter upon natural sparkling wines except natural sparkling cider containing more than three and two-tenths per centum of alcohol by volume, upon which the tax shall be four-tenths of a cent per liter;

(e) Twenty-one and one-tenth cents per liter upon liquors containing not more than twenty-four per centum of alcohol by volume; and

(f) Eighty-five and nine-tenths cents per liter upon all other liquors, when sold or used within this state, except when sold or used under such circumstances that this state is without power to impose such tax***.

New York State Tax Law

§ 445. Local taxes on beer and liquor by a city of one million or more

1. Any city in this state having a population of one million or more, acting through its local legislative body, is hereby authorized and empowered to adopt and amend local laws imposing in any such city excise taxes on a distributor and a noncommercial importer at the following rates:

(a) Twelve cents per gallon upon beers and

(b) Twenty-six and four-tenths cents per liter on the liquors described in paragraph (f) of subdivision one of section four hundred twenty-four, when sold or used in such city.

Such local law shall provide that if prior to the date upon which the taxes go into effect, a contract of sale of any beer or other alcoholic beverages described above was made, and delivery thereof pursuant to such contract is made within the city imposing such taxes on or after the effective date thereof, the vendor shall be deemed a distributor, and such beer and other alcoholic beverages shall be deemed to be sold, and shall be subject to the tax at the time of such delivery.

2. Every local law imposing taxes pursuant to the authority of subdivision one shall also impose upon each person, other than a distributor within the meaning of such local law, who, on the date the taxes imposed pursuant to the authority of such subdivision become effective, owns and possesses for the purposes of sale beer, or other alcoholic beverages described in subdivision one, a floor tax at the rates applicable under subdivision one upon such beer in excess of one hundred gallons and upon such other alcoholic beverages in excess of four hundred liters. Such floor tax shall be due and

payable on the twentieth day of the month succeeding the month in which the taxes become effective.

3. All the provisions of this article shall apply to the taxes authorized by subdivision one of this section and the provisions of section four hundred twenty, four hundred twenty-six, four hundred twenty-nine through four hundred thirty-four, four hundred thirty-six and four hundred thirty-seven shall apply to the tax authorized by subdivision two thereof, so far as such article or sections can be made applicable to the taxes authorized by this section with such limitations as set forth in this section and such modifications as may be necessary in order to adapt such language to the local taxes authorized by this section. Provided, however, in every case where the words "this state" appear in subdivision four of section four hundred twenty-four exempting quantities of liquor from tax, and in the definition of "Distributor" or "Noncommercial importer" in section four hundred twenty, such words "this state" shall be read as "this city" for purposes of the taxes authorized by this section. Where the word "state" is used in a phrase referring to the sale or use of alcoholic beverages in this state, such word "state" shall be read as "city" for purposes of the taxes authorized by this section, unless the word "city" clearly is not applicable.

4. Any taxes imposed pursuant to the authority of this section shall be administered and collected by the tax commission in the same manner as the taxes imposed under sections four hundred twenty-four and four hundred twenty-five subject to all provisions of this article as may be applicable. The state tax commission is hereby empowered to make such provisions as it deems necessary for the joint administration and collection of the state and local taxes imposed and authorized by this article. Nothing in this article which requires payment of both state and local taxes to the tax commission shall

collecting and distributing such taxes, out of which the comptroller shall pay any refunds of such taxes to which taxpayers shall be entitled under the provisions of this article. The comptroller, after reserving such refund and such costs shall, on or before the twelfth day of each month, pay to the appropriate fiscal officer of such city, the taxes, penalties and interest imposed by such city under the authority of this section, collected by the state tax commission pursuant to this article during the next preceding calendar month. The amount so payable shall be certified to the comptroller by the president of the state tax commission or his delegate, who shall not be held liable for any inaccuracy in such certificate. Where the amount so paid over to such city in any such distribution is more or less than the amount then due to such city, the amount of the overpayment or underpayment shall be certified to the comptroller by the president of the state tax commission or his delegate, who shall not be held liable for any inaccuracy in such certificate. The amount of the overpayment or underpayment shall be so certified to the comptroller as soon after the discovery of the overpayment or underpayment as reasonably possible and subsequent payments and distributions by the comptroller to such city shall be adjusted by subtracting the amount of any such overpayment from or by adding the amount of any such underpayment to such number of subsequent payments and distributions as the comptroller and the president of the state tax commission shall consider reasonable in view of the amount of the overpayment or underpayment and all other facts or circumstances.

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No. 82-2125

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.,; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

-against-

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., et al. as Members of the STATE TAX COMMISSION, and EDWARD J. McLAUGHLIN, et al. as Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., et al. and RETAILERS ALLIANCE, INC., et al.,

Intervenors-Appellees.

On Appeal from the Court of Appeals
of the State of New York

SUPPLEMENTAL BRIEF

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On Appeal from the Court of Appeals
of the State of New York

SUPPLEMENTAL BRIEF

The brief submitted in opposition to the motion to dismiss or affirm raises new matter and deals with other matters in so confusing a manner that we believe a short response will be helpful to the Court.

(1)

At the outset appellants call attention to Matter of Bacchus Imports, Ltd., 656 P. 2d 724 (Haw., 1983), pointing out that probable jurisdiction was noted on an appeal to this Court. That case involves similar overall issues, but the questions presented, relating to the Import-Export, the Commerce and the Equal Protection Clauses, rest on claimed improper discrimiantion consisting of exemption from the tax of a native Hawaiian liquor and all fruit wines manufactured in the State from farm products grown in the State.

The New York City tax has no exemption for local liquor or beer. Hence the grounds for the appeal in the Bacchus case are not present here.

(2)

Instead of dealing with our argument concerning the Import-Export Clause

or the grounds on which the State Courts found that the tax did not violate the Clause, appellants appear to be assuming that the tax was upheld as an inspection law.

To support their approach it is argued that the enactment of Chapter 316 of the Laws of 1960 amended the State Tax on Alcoholic Beverages "so as to eliminate the inspection purpose of the statute" (Br., p. 4). However, it is in error with regard to the nature of the 1960 amendment. Moreover, neither the City nor the State has claimed that its tax law was an inspection law.

The amendment in 1960 relied on by appellants merely eliminated a requirement that there be set aside from the tax revenues "a sum equal to the total amounts audited by him within such preceding month for expenses, including personal service and maintenance, of the state liquor au-

thority, of the county beverage control boards and of the New York city beverage control board." Such expenses may well be inspection expenses, but the tax law does not even intimate that it is an inspection law. In any event, the revenue it raises far exceeds the amount of such expenses.

It should be noted that the cases upholding the State tax, referred to at pages 22-23 of our Motion to Dismiss or Affirm, were decided a number of years after the change of the statute in 1960.

The appellants attempt to transform the City's tax into a tariff by reiteration, but the tax is imposed on a purely local event, the sale or use of the beer or liquor after they have come to rest in the City. It applies not only to importers, but to persons acquiring them or producing them.

(3)

The appellants persist in emphasizing Bulletin No. 529, issued by the New York State Liquor Authority under alcoholic beverage price control legislation. That legislation is independent of the State tax law and, if possible, even more independent of the enabling act for the City tax law and the City's Local Law imposing its tax. Even if the Bulletin could have been regarded as affecting the validity of the City's tax law while the Bulletin was in effect, it could not affect the law's validity once the Bulletin was invalidated and set aside by the New York Court of Appeals.

(4)

The appellants state that taxation of property of "extra-state non-residents" while exempting similar property of "intra-state residents" is a denial of equal protection of the laws. The state-

ment is obviously sound, but it has nothing to do with the tax law here involved. The tax applies to all alike. It provides no exemption.

CONCLUSION

The appeal should be dismissed or affirmed.

September 6, 1983.

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NO. 82-2125

IN THE

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Plaintiffs-Appellants,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and
RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

On Appeal from the New York State Court of Appeals

BRIEF IN OPPOSITION TO THE MOTION OF APPELLEES KOCH AND THE CITY OF NEW YORK AND THE STATE TAX COMMISSION TO DISMISS OR TO AFFIRM

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
POINT I—Import-Export Clause	3
POINT II—Commerce Clause	6
POINT III—Supremacy Clause	8
POINT IV—Equal Protection Clause	10
CONCLUSION	11
APPENDIX	1a

PAGE

Table of Authorities

Cases Cited

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 11

Bacchus Imports, Ltd., et al. v. George Freitas, Director of Taxation of the State of Hawaii, Filed March 15, 1983, Docket No. 82-1565 2

Community Communications Co. v. City of Boulder, 455 U.S. 40, 103 S.Ct. 835 9

Mancini v. McLaughlin, 54 NY2d 860, amd. 54 N.Y. 2d 863 8

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 7

Nippert v. Richmond, 327 U.S. 416, 429 at n.19 6

Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959) 7

Patapsco Guano Co. v. Board of Agriculture, 371 U.S. 191 (1898) 6

Wheeling Steel Corporation v. Glander National Distillers Products Co. v. Glander, 337 U.S. 562 11

United States Constitution Cited

Article I, Section 8, Clause 3 ..... 2, 6

Article I, Section 10, Clause 2..... 2, 3

Article VI, Clause 2 8

Fourteenth Amendment, Section 1 10

Twenty-first Amendment 8

PAGE

Statutes Cited

L. 1960, Ch. 316 (McKinney's Session Laws of New York, 1960):

Secs. 2, 6, pp. 520, 522 4

L. 1971, Ch. 406 (McKinney's Session Laws of New York, 1971):

Sec. 1, p. 572 5

L. 1978, Ch. 433 (McKinney's Session Laws of New York, 1978):

p. 741 5

Sherman Act 10

Tax Law:

Sec. 171-a 5

Sec. 435 5

Sec. 445, Art. 18 3

Other Authorities Cited

Assembly 8082 5

Bulletin No. 529 8

Editorial, The New York Times of April 17, 1964 6

1971 Legislative Index:

pp. S683, A788 5

Local Law No. 30 ..... 3, 5, 8

PAGE

Senate 7049 5

Tariff Schedules of United States Annotated (1981):

Schedule I, Part 12, Beverages 5

NO. 82-2125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

METROPOLITAN PACKAGE STORE ASSOCIATION, INC.; PAUL WAYNE, d/b/a COLONY LIQUORS; and WILLIAM GRANT & SONS, INC.,

Plaintiffs-Appellants,

—against—

EDWARD I. KOCH, as Mayor of the City of New York, and THE CITY OF NEW YORK; and JAMES H. TULLY, JR., MILTON KOERNER and THOMAS H. LYNCH as President and Members of the STATE TAX COMMISSION and EDWARD J. McLAUGHLIN, TERRENCE R. FLYNN, HUGH B. MARIUS, and ROBERT T. DOYLE as Chairman and Members of the STATE LIQUOR AUTHORITY,

Defendants-Appellees,

ACE WINES & LIQUORS, INC., *et al.* and RETAILERS ALLIANCE, INC., *et al.*,

Intervenors-Appellees.

On Appeal from the New York State Court of Appeals

BRIEF IN OPPOSITION TO THE MOTION OF APPELLEES KOCH AND THE CITY OF NEW YORK AND THE STATE TAX COMMISSION TO DISMISS OR TO AFFIRM

Appellants respectfully direct the attention of the Court to the case presently pending before this Court which is very similar on its facts and involves the same basic principles of constitutional law as those on this appeal. The reference is to an appeal from the Supreme Court of Hawaii in *Bacchus Imports, Ltd., et al.* v. *George Freitas, Director of Taxation of the State of Hawaii,* Filed March 15, 1983, Docket No. 82-1565; in which the Court noted probable jurisdiction on June 20, 1983 (52 L.W. 3069).

The questions involved in *Bacchus Imports, Ltd., et al.* are:

1. Does a state tax of 20% on the sale at wholesale of all liquor sold in Hawaii, which singles out (by exemptions for locally produced liquors) imported liquor for discriminatory taxation, constitute a duty or impost on imports prohibited by the Import-Export Clause (U.S. Const., Art. I, §10, cl. 2)?

2. Does such a discriminatory state tax, imposed for the purpose of fostering and protecting certain local liquor industries, infringe unconstitutionally on the power of Congress under the Commerce Clause (U.S. Const., Art. I, §8, cl. 3)?

3. Does such a discriminatory state tax, by exempting from the tax certain locally made liquors while taxing other liquors imported into Hawaii by appellant wholesalers, deny to them the equal protection of the laws?

The fact that these two cases so similar on their facts and principles of constitutional law should almost simultaneously reach this Court is extraordinary, given the inertia of federal-state relations on the side of localism. In the past it has been the function of the Court to put the inertia on the other side; on the side of nationhood and union.

At the threshhold the appellees move to dismiss the appeal or, alternatively to affirm on the ground that there is no substantial federal question, and "that the questions presented are so manifestly unsubstantial as not to need further argument", then curiously proceeds to contradict that statement with thirty-five pages of argumentation. Suffice it to say that the Supreme Court, Albany County, in its order of September 23, 1980, disagreed and granted appellants' motion for a preliminary injunction on the grounds that Local Law No. 30 did violate the Constitution of the United States and on appeal the Appellate Division modified by reversing the portion granting the preliminary injunction, but otherwise affirmed, but denied appellees' cross-motion to dismiss without so much as a word adverting to the constitutional question* on which the order was based.

POINT I

Import-Export Clause

Article I, Section 10, Cl. 2 of the Constitution provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws:**"

The enabling legislation for Local Law No. 30 is to be found in Section 445 of Article 18 of the Tax Law. Until the enactment of Chapter 316, L. 1960, Article 18 of the Tax Law was compatible with the Import-Export Clause.

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* Appendix 6a to Jurisdictional Statement. 80 A.D.2d 940.

Chapter 316*, L. 1960 (McKinney's Session Laws of New York, 1960, page 519) amended Article 18 so as to eliminate the inspection purpose of the statute although otherwise retaining the same general statutory pattern. After 1960 the statute was no longer compatible with the Import-Export Clause since the tax receipts from liquor were paid into the General Fund, and no longer used for inspection purposes. It had become a state tariff, duty or impost for general revenue purposes**; this was accomplished by abolition of the "state purposes fund" by Chapter 316 (§2 and §6) to which the comptroller had previously been required to transfer Article 18 receipts, to be used for the maintenance of the State Liquor Authority, the county control boards and the New York City Control Board, all of them being New York *State* control and inspection agencies.

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* Prior to Ch. 316, L. 1960, there was a "local assistance fund" in the general fund into which was to be paid all moneys from:

> "(16) article eighteen of the tax law (except moneys paid into the state purposes fund pursuant to the provisions of subdivision three of section four hundred thirty-five of the tax law.)" (Matter in brackets deleted.)

Sec. 6 of Ch. 316, L. 1960, required the above tariffs be paid into the general fund by eliminating the "state purpose fund" and the elimination of the provision requiring ("a sum equal to the total amounts audited by him within such preceding month for expenses, including personal service and maintenance, of the state liquor authority, of the county beverage control boards and of the New York City control board incurred pursuant to appropriations**") (Matter in brackets deleted.) McKinney's Session Laws of New York-1960-pages 520 and 522.

** The opinion of the Appellate Division below holds that the Local Law No. 30 is "solely revenue producing". Appendix 31a. Also appellees in their motion make the same admission that the tax is a pure "revenue measure". P. 34.

New York City has no inspection agencies, and Local Law No. 30 is in no way compatible with the Import-Export Clause. Presently, Section 435 provides that these taxes are to be disposed of pursuant to Section 171-a of the Tax Law which his no inspection purposes.

The enabling provisions for the New York City law in Section 445 were not added to Article 18 until the enactment of Chapter 406* of the Laws of 1971, Sec. 1. McKinney's Session Laws of New York—1971—page 572, and amended by Ch. 433, L. 1978, McKinney's Session Laws of New York—1978—page 741 (Metric Standards of File).

The foregoing summary of the derivation and history of Tax Law Article 18 in general and the enabling legislation in particular makes it clear that the tax involved here was intended to be a tariff and not a sales tax. It is a duty or impost on national brands including Scotch, Irish and Canadian Whiskys and others similar to the import tariffs administered by the United States Customs Service**, for there are no distilleries in all New York and no breweries in New York City. But, nevertheless, the State imposes a tax of 89.5 cents and the City 26.4 cents upon a liter of spirits which is discriminatory and burdensome upon commerce and neither of which taxes are apportioned.***

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* Introduced in the Senate (S7049) and Assembly (A8082) on Sunday, June 6, 1971, and passed both Houses the same day on Messages of Necessity from the Governor. 1971 Legislative Index, pages S683 and A788 respectively.

** Tariff schedules of United States Annotated (1981) Schedule I, part 12, Beverages.

*** "* * * But if a nondiscriminatory state tax may become discriminatory or unduly burdensome by virtue of the fact that

(Footnote continued on following page)

In summary then, New York City has no inspection powers under law; the tariffs are used for general revenue purposes and not restricted to use for "what may be necessary for executing its inspection Laws". Local Law No. 30 of 1980 is clearly unconstitutional. *Patapsco Guano Co.* v. *Board of Agriculture,* 371 U.S. 191, 195 (1898).

POINT II

Commerce Clause

The Commerce Clause in Article I, Section 8, of the United States Constitution provides:

> "The Congress shall have Power * * * To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

It was commerce that brought about the enactment of the Constitution itself in the first place because state governments had been too responsive to local economic interest, with the consequence that interstate economic competition was conducted more through political processes than through the market place. Here the enabling legislation expressly discriminated against liquor which is imported into the state in favor of wine, a domestic product, which is sought to protect by excluding it from tax. The statute is clearly tailored to accomplish its discriminatory

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(Footnote continued from preceding page)

other States also may impose a similar tax bearing upon the transaction, the possibilities for such multiplication would seem obviously to be magnified many times by the application of municipal taxes like that involved here." *Nippert* v. *Richmond,* 327 U.S. 416, 429 at n. 19.

objectives.* The legislation could not have passed, without votes from the upstate wine growing areas of the State and a Message of Necessity from the Governor.**

The appellees constantly use the words "when sold or used" within the City*** as if they have some talismanic effect in determining this case. Most recently, however, in its opinion in *Michelin Tire Corp.* v. *Wages,* 423 U.S. 276, 288 at p. 7 (1976), this Court again envisioned that type of tax indicated plainly its unconstitutionality:

> "Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though

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* See Appendix for relevant statutes.

** There has been a history in New York State of discrimination in favor of the domestic wine industry as evidenced by the following editorial in *The New York Times* of April 17, 1964, which also indicates their sensitivity to price differentials:

* * *

> "Earlier the Joint Legislative Committee had recommended that price controls be lifted from wine but be kept on spirits. This discriminatory approach was opposed by the wine-growers and producers in New York State, who claimed that they were being singled out as the victims in the battle for lower prices. But reversing the situation does not mean that they emerge as the victors. The state's wine-growers will end up selling less wine simply because it will be relatively cheaper to buy spirits."

*** However, "* * * no State, consistent with the Commerce Clause may impose a tax which discriminates against interstate commerce * * * by providing a direct commercial advantage to local business' Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959).

> operating after an 'initial sale' of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost. Nothing in the opinion in Brown v. Maryland should suggest otherwise. The Court in Brown merely presumed that at these later stages of commercial activity, state impositions would not be discriminatory."

Since the City ordinance is not protected by the Twenty-first Amendment, the importation of not only liquor, but any product, would be subject to tax in any city enacting such a tariff, and thus again create the chaotic conditions that existed under the Articles of Confederation.

POINT III

Supremacy Clause

Article VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof • • • shall be the supreme Law of the Land; • • •".

The State Liquor Authority implemented* Local Law No. 30 of 1980 by issuing Bulletin No. 529 requiring the payment of an additional 20% of the tax to the wholesalers. This was done at the behest of the wholesalers and was subsequently declared to be invalid in *Mancini* v. *McLaughlin,* 54 N.Y.2d 860, amd. 54 N.Y.2d 863, in a separate action not involving the tax. It appears to be the contention of the appellees that since Bulletin 529 has been declared invalid, that the courts are re-

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* Appellate Division opinion—Appendix, p. 21a.

stricted to a bare-boned consideration of the tax statute by itself; rather than the skeletal form of the statute as fleshed out by application, interpretation and administration, so as to enable the Court to determine the practical effect of the statute. The decision in *Mancini* was handed down October 13, 1981, but the bulletin was not repealed until May of 1982 when it was replaced with a bulletin which permissively allowed the same practices as mandated under bulletin 529 to continue, and those practices continue to this day.

In principle, the situation is similar to that in *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40, 103 S.Ct. 835, where the community enacted a ninety-day moratorium which was to be followed by a model ordinance which the plaintiff had to agree to comply with. On the eighty-ninth day, *Community Communications* secured a preliminary injunction in the Federal District Court before the 90-day ordinance expired the following day. The U. S. Court of Appeals, Tenth Circuit, reversed the judgment and order of the District Court and remanded the case on the ground that the ninety-day moratorium had expired and the model ordinance was not issue. This Court granted certiorari and reversed the court below. In a rather sharp dissenting opinion in the Court of Appeals Justice Markey said as to the issue before the Court:

> "• • • I remain sorely troubled, however, by what to me is a gnawing presence of negative pregnants.
>
> First, the majority faults the trial judge for not differentiating between the 'two principal actions' of the city. But there was no reason to differentiate. The city's actions, like a man's legs, were of equal dimension and importance in the city's scheme. Moreover, as the majority recognizes, the moratorium expired the day after the injunction is-

> sued and the trial judge did differentiate, in considering the model ordinance and refusal to deny an intent to repeat the moratorium as substantial and continuing factors, which, as discussed above, they were and are."

The majority had held that the moratorium ordinance had terminated by its terms on the ninetieth day and that the model ordinance did "not seem to be an issue in the case" id page 706. By this process of reasoning it felt there was nothing left before the Court for it to determine, so it reversed the judgment of the District Court. The Supreme Court, however, granted certiorari 455 U.S. 40 (1981) and reversed.

As noted, the Appellate Division here made the same mistake and found that the by then invalidated Bulletin No. 529 and the continuing price scheme were no longer in issue before it; so it threw it out the baby with the wash water.

There was however, still a *per se* price fixing violation as well as a pre-exemption by the Sherman Act here still to be disposed of in this action.

POINT IV

Equal Protection Clause

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall • • • deny to any person within its jurisdiction the equal protection of the laws".

The taxation of property of extra-state non-residents while exempting from taxation similar property of intra-

state residents is a violation of the Equal Protection Clause of the XIV Amendment of the Constitution, and a breach of the principle of federalism.

Wheeling Steel Corporation v. *Glander National Distillers Products Co.* v. *Glander*, 337 U.S. 562
Allied Stores of Ohio, Inc. v. *Bowers*, 358 U.S. 522 (Mr. Justice Brennan Concurring)

CONCLUSION

This Motion should either be summarily dismissed or at the least, probable jurisdiction should be noted in this case.

Respectfully submitted,

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Dated: August 24, 1983

[APPENDIX FOLLOWS]

APPENDIX

Tax Law Sec. 445(1)(a) and (b) provides for *City* tax:

> 1. Any city in this state with a population of one million or more * * * is empowered to adopt and amend local laws imposing in any such city excise taxes on a distributor * * * at the following rates:
>
> (a) Twelve cents per gallon upon beers and
>
> (b) Twenty-six and four-tenths cents per liter on liquors described in paragraph (f) of subdivision one of section four hundred twenty-four, when sold or used in such city.

Tax Law Sec. 424(1)(a) through (f) in pertinent part imposes the following *State* taxes:

> (a) Four and four-ninths cents per gallon upon beers;
>
> (b) Two and six-tenths cents per liter upon still wines * * *
>
> (c) Seven cents per liter upon artificially carbonated sparkling wines * * *
>
> (d) Fourteen and one-tenth cents per liter upon natural sparkling wines * * *
>
> (e) Twenty-one and one-tenth cents per liter upon liquors containing not more than twenty-four per centum of alcohol by volume; and

(f) Eighty-five and nine-tenths cents per liter upon all other liquors when sold or used within this state, * * *"

* * *

It will be noted that all wine and some wine based items (b to e) are excluded from this tailored New York City enabling statute for the protection of the domestic wine industry. Only (a) and (f) were incorporated in the City legislation.